23/80

IN THE PRIVY COUNCIL No. 5 of 1979

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

PORT JACKSON STEVEDORING PTY. LIMITED Appellant (Second Named Defendant)

- and -

SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED Respondent (Plaintiff)

RECORD OF PROCEEDINGS

RICHARDS BUTLER AND CO.
5 Clifton Street,
London, EC2A 4DQ

Solicitors for the Appellant

CLYDE AND CO.
Colonial House,
30 Mincing Lane,
London, EC3

Solicitors for the Respondent

IN THE PRIVY COUNCIL No.5 of 1979

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N :

PORT JACKSON STEVEDORING PTY. LIMITED — Appellant (Second Named Defendant)

- and -

SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED — Respondent (Plaintiff)

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL No. 5 of 1979

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N :

PORT JACKSON STEVEDORING PTY. LIMITED — Appellant (Second Named Defendant)

- and -

SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED — Respondent (Plaintiff)

10

RECORD OF PROCEEDINGS

No. 1

AMENDED ISSUES FOR TRIAL
8th April 1975

In the Supreme Court of New South Wales

No.1 Amended Issues for Trial

8th April 1975

IN THE SUPREME COURT OF NEW SOUTH WALES) No. 5033 of 1971

BETWEEN: SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED — Plaintiff

20

AND: JOINT CARGO SERVICES PTY.LIMITED and PORT JACKSON STEVEDORING PTY. LIMITED — Defendants

AMENDED ISSUES FOR TRIAL

WRIT issued: 2nd day of June, 1971

NOTICE OF APPEARANCE of firstnamed defendant entered: 22nd day of June, 1971.

NOTICE OF APPEARANCE of secondnamed defendant entered: 22nd day of June, 1971.

30 AMENDED DECLARATION dated: 26th day of March, 1975

In the Supreme Court of New South Wales

No.1
Amended Issues for Trial

8th April 1975

(continued)

SYDNEY)
TO WIT)

SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED a company duly incorporated and entitled to sue in and by its aforementioned corporate name and style by MARY ELIZABETH THOMSON its Attorney sues JOINT CARGO SERVICES PTY.LIMITED and PORT JACKSON STEVEDORING PTY. LIMITED being each of them companies duly incorporated and liable to be sued in and by their respective aforementioned names and styles FOR THAT there were delivered to the defendants certain cartons of goods of the plaintiff to be safely kept and taken care of by the defendants for the plaintiff for reward to the defendants and the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid YET the defendants kept the said goods in a negligent manner and took no care of the same whereby they were wholly lost to the plaintiff and the plaintiff being in doubt as to which of the defendants it is entitled to redress from sues the defendants jointly severally and in the alternative to the intent that the question as to which, if any, of the defendants is liable and to what extent may be determined as between all parties in accordance with the statute made and provided.

2. AND for a second count the plaintiff sues the defendants FOR THAT there were delivered to the defendants certain cartons of goods of the plaintiff to be safely kept and taken care of by the defendants for the plaintiff and the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid YET the defendants kept the said goods in a negligent manner and took no care of the same whereby they were wholly lost to the plaintiff and the plaintiff being in doubt as to which of the defendants it is entitled to redress from sues the defendants jointly and severally and in the alternative to the intent that the question as to which, if any, of the defendants is liable and to what extent may be determined as between all parties in accordance with the statute made and provided.

3. AND for a third count the plaintiff sues the defendants FOR THAT there were delivered to the defendants certain

cartons of goods of the Plaintiff to be safely kept and taken care of by the defendants for the plaintiff and to be delivered by the defendants to the plaintiff on demand for a reward to the defendants and the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid YET the defendants in breach of their duty as bailees as aforesaid failed upon demand by the plaintiff or at all to deliver the said goods to the plaintiff and the plaintiff being in doubt as to which of the defendants it is entitled to redress from sues the defendants jointly and severally and in the alternative to the intent that the question as to which, if any, of the defendants is liable and to what extent may be determined as between all parties in accordance with the statute made and provided.

4. AND for a fourth count the plaintiff dues the defendants FOR THAT there were delivered to the defendants certain cartons of goods of the plaintiff to be safely kept and taken care of by the defendants for the plaintiff and to be delivered by the defendants to the plaintiff on demand and the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid YET the defendants in breach of their duty as bailees aforesaid failed upon demand by the plaintiff or at all to deliver the said goods to the plaintiff and the plaintiff being in doubt as to which of the defendants it is entitled to redress from sues the defendants jointly and severally and in the alternative to the intent that the question as to which, if any, of the defendants is liable and to what extent may be determined as between all parties in accordance with the statute made and provided.

5. AND for a fifth count the plaintiff sues the defendants FOR THAT there were delivered to the defendants certain cartons of goods of the plaintiff to be safely kept and taken care of by the defendants for the plaintiff and to be delivered by the defendants to the plaintiff on demand and for a reward to the defendants and the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid YET the defendants in breach of their duty as bailees as aforesaid and without the authority of the plaintiff delivered the said goods to a person or persons other than the plaintiff and being a person or persons having no title or claim to possession of the said goods or any of them whereby the said goods were wholly lost to the plaintiff and the plaintiff being

In the Supreme Court of New South Wales

No.1
Amended Issues for Trial

8th April 1975

(continued)

in doubt as to which of the defendants it is entitled to redress from sues the defendants jointly and severally and in the alternative to the intent that the question as to which, if any, of the defendants is liable and to what extent in accordance with the statute made and provided.

6. AND for a sixth count the plaintiff sues the defendants FOR THAT there were delivered to the defendants certain cartons of goods of the plaintiff to be safely kept and taken care of by the defendants for the plaintiff and to be delivered by the defendants to the plaintiff on demand and the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid YET the defendants in breach of their duty as bailees as aforesaid and without the authority of the plaintiff delivered the said goods to a person or persons other than the plaintiff and being a person or persons having no title or claim to possession of the said goods or any of them whereby the said goods were wholly lost to the plaintiff and the plaintiff being in doubt as to which of the defendants it is entitled to redress from sues the defendants jointly and severally and in the alternative to the intent that the question as to which, if any, of the defendants is liable and to what extent may be determined as between all parties in accordance with the statute made and provided.

PARTICULARS UNDER ORDER X RULE 7A

The cartons of goods, the subject of this action, which consisted of the following:

Carton Nos.1-2, 4-7 each 30 doz. Razor & Blades (art.274) @ c 8.52 per Doz. i.e. 180 Doz.	$1,533.60
Carton Nos.14, 16-20 corrugated cartons for packing Razor Blades	158.50
Carton Nos.8-13 each 144 Doz. Krona Chrome Dispenser 8's (art.1780) @ 60.60 c per 1000 i.e., 82944 Blades	4,981.62
Carton Nos.21-24, 26-28,30-37 each 216 Doz. Krona Chrome Dispenser 4's (art.744) @ c 70.19 per 1000 i.e.155, 520 Blades	10,015.95
CAN	$17,589.67
@ 1.1978	$14,684.98

were delivered into the custody of the first or second defendant or both of them at No.2 Wharf Shed Glebe Island on or about the 12th May, 1970 from the SS "New York Star" and while in such custody were on or about 13th May, 1970 stolen by a person or persons unknown. It will be alleged that the first or second defendant or both of them failed to safely keep or take care of the goods and kept them in a negligent manner and took no care of them in that the goods were stolen whilst in such custody.

AMENDED PLEAS of firstnamed Defendant
filed: 3rd day of April, 1975

JOINT CARGO SERVICES PTY.LIMITED

- and -

PORT JACKSON STEVEDORING PTY.LIMITED

- ats -

SALMOND & SPRAGGON (AUSTRALIA) PTY.LIMITED

The first named defendant by JOHN KING BOWEN its solicitor says that it is not guilty.

2. And for a second plea the firstnamed defendant as to so much of the first count of the declaration as alleges that there were delivered to the firstnamed defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the firstnamed defendant for the plaintiff for reward to the firstnamed defendant and the firstnamed defendant received and had the said goods in its care and keeping for the purpose and upon the terms aforesaid denies the said allegations and each and every one of them.

3. And for a third plea the firstnamed defendant as to so much of the second count of the declaration as alleges that there were delivered to the firstnamed defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the firstnamed defendant for the plaintiff and the firstnamed defendant received and had the said goods in its care and keeping for the purpose and upon the terms aforesaid denies the said allegations and each and every one of them.

4. And for a fourth plea the firstnamed defendant as to so much of the third count of the declaration as alleges that there were delivered to the firstnamed defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the firstnamed defendant for the plaintiff and to

In the Supreme Court of New South Wales

No.1 Amended Issues for Trial

8th April 1975

(continued)

be delivered by the firstnamed defendant to the plaintiff on demand for a reward to the firstnamed defendant and the firstnamed defendant received and had the said goods in its care and keeping for the purpose and on the terms aforesaid denies the said allegations and each and every one of them.

5. And for a fifth plea the firstnamed defendant as to so much of the fourth count of the declaration as alleges that there were delivered to the firstnamed defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the firstnamed defendant for the plaintiff and to be delivered by the firstnamed defendant to the plaintiff on demand and the firstnamed defendant received and had the said goods in its care and keeping for the purpose and upon the terms aforesaid denies the said allegations and each and every one of them.

6. And for a sixth plea the firstnamed defendant as to so much of the fifth count of the declaration as alleges that there were delivered to the firstnamed defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the firstnamed defendant for the plaintiff and to be delivered by the firstnamed defendant to the plaintiff on demand for a reward to the firstnamed defendant and the firstnamed defendant received and had the said goods in its care and keeping for the purpose and upon the terms aforesaid denies the said allegations and each and every one of them.

7. And for a seventh plea the firstnamed defendant as to so much of the sixth count of the declaration as alleges that there were delivered to the firstnamed defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the firstnamed defendant for the plaintiff and to be delivered by the firstnamed defendant to the plaintiff on demand and the firstnamed defendant received and had the said goods in its care and keeping for the purpose and upon the terms aforesaid denies the said allegations and each and every one of them.

8. And for an eighth plea the firstnamed defendant says that the goods referred to in the plaintiff's declaration were goods which were shipped from Canada to Sydney in Australia on board the vessel "New York Star" and the firstnamed defendant was the

Ship's Agent in Sydney for the Carrier of the said goods and the said goods were delivered to the firstnamed defendant as such Agent and not otherwise and the Plaintiff was the Consignee of the said goods and the said goods were shipped as aforesaid pursuant to the provisions of a certain Bill of Lading and the said Bill of Lading contained the following terms
10 and conditions :

> "In accepting this Bill of Lading the Shipper, Consignee and Owners of the goods, and the Holder of this Bill of Lading, agree to be bound by all of its conditions, exceptions and provisions whether written, printed or stamped on the front or back hereof.
>
> 2. It is expressly agreed that no servant or agent of the Carrier
> 20 (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or
> 30 default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or
> 40 to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or
> 50 agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading."

and the plaintiff accepted the said Bill of Lading.

9. And for a ninth plea the firstnamed defendant says that the goods referred to in

the plaintiff's declaration were goods which were shipped from Canada to Sydney in Australia on board the vessel "New York Star" and the firstnamed defendant was the Ship's Agent in Sydney for the Carrier of the said goods and the said goods were delivered to the firstnamed Defendant as such Agent and not otherwise and the plaintiff was the Consignee of the said goods and the said goods were shipped from Canada to Australia pursuant to the provisions of a certain Bill of Lading and the said Bill of Lading contained the following terms and conditions: 10

> "In accepting this Bill of Lading the Shipper, Consignee and the Owners of the goods, and the Holder of this Bill of Lading, agree to be bound by all of its conditions, exceptions and provisions whether written, printed or stamped on the front or back hereof. 20
>
> 2. It is expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading. 30 40 50

5. The Carrier's responsibility in respect of the goods as a Carrier shall not attach until the goods are actually loaded for transportation upon the ship and shall terminate without notice as soon as the goods leave the ship's tackle at the Port of Discharge from ship or any other place where the Carrier is authorised to make delivery or and its responsibility. Any responsibility of the Carrier in respect of the goods attaching prior to such loading, or continuing after leaving the ship's tackles as aforesaid, shall not exceed that of an ordinary bailee, and, in particular, the Carrier shall not be liable for loss or damage to the goods due to flood; fire as provided elsewhere in this Bill of Lading; falling or collapse of wharf, pier or warehouse; robbery, theft or pilferage; strikes lockouts or stoppage or restraint of labour from whatever cause, whether partial or general; any of the risks or causes mentioned in paragraphs (a), (c) to (i), inclusive, and (k) to (p) inclusive, of subdivision 2 of section 4 of the Carriage of Goods by Sea Act of the United States; or any risks or causes whatsoever, not included in the foregoing, and whether like or unlike those herein abovementioned, where the loss or damage is not due to the fault or neglect of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any non-delivery or mis-delivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier."

and the plaintiff accepted the said Bill of Lading and the said goods were lost due to theft or pilferage after leaving the ship's tackle.

10. And for a tenth plea the firstnamed defendant says that the goods referred to in the plaintiff's declaration were goods which were shipped from Canada to Sydney in Australia on board the vessel "New York Star" and the firstnamed defendant was the Ship's Agent in Sydney for the Carrier of the said goods and the said goods were delivered to the firstnamed defendant as such Agent and not otherwise and the plaintiff was the Consignee of the said goods and the said goods were shipped from Canada to Australia pursuant to the provisions of a certain Bill of Lading and the said Bill of Lading contained the following terms and conditions :

"In accepting this Bill of Lading the Shipper, Consignee and the Owners of the goods, and the Holder of this Bill of Lading agree to be bound by all of its conditions, exceptions and provisions whether written, printed or stamped on the front or back hereof.

2. It is expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as Agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading.

17. In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered, suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear."

and the plaintiff accepted the said Bill of

Lading, and this action was not brought within one year after the date when the said goods should have been delivered.

AMENDED PLEAS of the secondnamed defendant filed: 20th day of March, 1975.

PORT JACKSON STEVEDORING PTY.LIMITED & ANOR

ats.

SALMOND & SPRAGGON (AUSTRALIA) PTY. LIMITED

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The secondnamed Defendant by ANTHONY TUMNER MARTIN says that it is not guilty.

2. And for a second plea the secondnamed Defendant as to so much of the first count of the Declaration as alleges that there were delivered to the Defendants certain cartons of goods of the Plaintiff to be safely kept and taken care of by the Defendants for the Plaintiff for rewards to the Defendants and the Defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid denies the allegations and each of them.

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3. And for a third plea the secondnamed Defendant as to such of the second count as alleges that there were delivered to the Defendants certain cartons of goods of the Plaintiff to be safely kept and taken care of by the Defendants and the Defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid denies the allegations and each of them.

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4. And for a fourth plea the secondnamed Defendant as to so much of the third count as alleges that there were delivered to the Defendants certain cartons of goods of the Plaintiff to be safely kept and taken care of by the Defendants for the Plaintiff on demand for a reward to the Defendants and the Defendants received and had the said goods in their care and keeping for the purposes and upon the terms aforesaid yet the Defendants in breach of their duty as bailees as aforesaid failed upon demand by the Plaintiff or at all to deliver the said goods to the Plaintiff denies the allegations and each of them.

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5. And for a fifth plea the secondnamed Defendant as to so much of the fourth count as alleges that there were delivered to the Defendants certain cartons of goods of the Plaintiff to be safely kept and taken care of by the Defendants for the Plaintiff and

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to be delivered by the Defendants to the Plaintiff on demand and the Defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid yet the defendants in breach of their duty as bailees as aforesaid failed upon demand by the Plaintiff or at all to deliver the said goods to the Plaintiff denies the allegations and each of them. 10

6. And for a sixth plea the secondnamed Defendant as to so much of the fifth count as alleges that there were delivered to the Defendants certain cartons of goods of the Plaintiff to be safely kept and taken care of by the Defendants for the Plaintiff and to be delivered by the Defendants to the Plaintiff on demand for a reward to the Defendants and the Defendants received and had the said goods in their care and 20 keeping for the purpose and upon the terms aforesaid yet the Defendants in breach of their duty as bailees as aforesaid and without the authority of the Plaintiff delivered the said goods to a person or persons having no title or claim to possession of the said goods or any of them whereby the said goods were wholly lost to the Plaintiff denies the allegations and each of them. 30

7. And for a seventh plea the secondnamed Defendant as to so much of the sixth count as alleges that there were delivered to the Defendants certain cartons of goods of the Plaintiff to be safely kept and taken care of by the Defendants for the Plaintiff and to be delivered by the Defendants to the Plaintiff on demand and the Defendants received and had the said goods in their care and keeping for the purpose and upon 40 the terms aforesaid yet the Defendants in breach of their duty as bailees as aforesaid and without the authority of the Plaintiff delivered the said goods to a person or persons other than the Plaintiff and being a person or persons having no title or claim to possession of the said goods or any of them whereby the said goods were wholly lost to the Plaintiff denies the allegations and each of them. 50

8. And for an eighth plea the secondnamed Defendant says that the goods referred to in the Plaintiff's Declaration were goods which were shipped from Canada to Sydney in Australia on board the vessel "New York Star" and the firstnamed Defendant was the ship's agent in Sydney for the carrier of the said goods and the said goods were delivered to the firstnamed Defendant as such agent and

not otherwise and the secondnamed Defendant was employed by the firstnamed Defendant as an independent contractor for the performance of services on behalf of the firstnamed Defendant in respect of the said goods and the Plaintiff was the consignee of the said goods and the said goods were shipped as aforesaid pursuant to the provisions of a certain bill of lading and the said bill of lading contained the following terms and conditions :

> "In accepting this bill of lading the shipper, consignee and owners of the goods, and the holder of this bill of lading, agree to be bound by all of its conditions, exceptions and provisions whether written, printed or stamped on the front or back thereof.
>
> It is expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this bill of lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation condition and liberty herein contained and every right, exemption from liability, defense and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time including independent contractors as aforesaid and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by the bill of lading."

And the Plaintiff accepted the said bill of lading.

9. And for a ninth plea the secondnamed Defendant says that the goods referred to in the Plaintiff's Declaration were goods which were shipped from Canada to Sydney in Australia on board the vessel "New York Star" and the firstnamed Defendant was the ship's agent in Sydney for the carrier of the said goods and the said goods were delivered to the firstnamed Defendant as such agent and not otherwise and the secondnamed Defendant was employed by the firstnamed Defendant as an independent contractor for the performance of services on behalf of the firstnamed Defendant in respect of the said goods and the Plaintiff was the consignee of the said goods and the said goods were shipped as aforesaid pursuant to the provisions of a certain bill of lading and the said bill of lading contained the following terms and conditions: 10 20

> "In accepting this bill of lading the shipper, consignee and owners of the goods, and the holder of this bill of lading, agree to be bound by all of its conditions exceptions and provisions whether written, printed or stamped on the front or back thereof.
>
> It is expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this bill of lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any, neglect or default on his part while acting in the course of or in connection with his employment and without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defense and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to 30 40 50

time including independent contractors as aforesaid and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by the bill of lading."

"The carrier's responsibility in respect of the goods as a carrier shall not attach until the goods are actually loaded for transportation upon the ship and shall terminate without notice as soon as the goods leave the ship's tackle at the Port of Discharge from ship or other place where the carrier is authorised to make delivery or and its responsibility. Any responsibility of the Carrier in respect of the goods attaching prior to such loading or continuing after leaving the ship's tackles as aforesaid, shall not exceed that of an ordinary bailee, and, in particular, the carrier shall not be liable for loss or damage to the goods due to flood, fire, as provided elsewhere in this bill of lading; falling or collapse of wharf, pier or warehouse; robbery, theft or pilferage; strikes, lockouts or stoppages or restraint of labour from whatever cause, whether partial or general; any of the risks or causes mentioned in paragraphs (a), (e) to (i), inclusive, and (k) to (p) inclusive of subdivision 2 of section 4 of the Carriage of Goods by Sea Act of the United States; or any risks or causes whatsoever, not included in the foregoing, and whether like or unlike those hereinabove mentioned where the loss or damage is not due to the fault or neglect of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any non-delivery or mis-delivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the carrier."

And the Plaintiff accepted the said Bill of Lading and the said goods were lost due to theft or pilferage after leaving the ship's tackle.

10. And for a tenth plea the secondnamed Defendant says that the goods referred to in the Plaintiff's Declaration were goods which were shipped from Canada to Sydney in Australia on board the vessel "New York Star" and the firstnamed Defendant was the ship's agent in Sydney for the carrier of the said goods and the said goods were delivered to the firstnamed Defendant as such agent and not otherwise and

the secondnamed Defendant was employed by the firstnamed Defendant as an independent Contractor for the performance of services on behalf of the firstnamed Defendant in respect of the said goods and the Plaintiff was the consignee of the said goods and the said goods were shipped as aforesaid pursuant to the provisions of a certain bill of lading and the said bill of lading contained the following terms and conditions : 10

> "In accepting this bill of lading the shipper, consignee and owners of the goods, and the holder of this bill of lading, agree to be bound by all of its conditions, exceptions and provisions whether written, printed or stamped on the front or back thereof."

> "It is expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier)shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this bill of lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defense and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time including independent contractors as aforesaid and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by the bill of lading." 20 30 40 50

> "In any event the carrier and the ship

shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by
10 an agreement to appear."

And the Plaintiff accepted the said Bill of Lading and this action was not brought within one year after the date when the said goods should have been delivered.

REPLICATION to Amended Pleas of firstnamed Defendant dated: 3rd day of April, 1975

SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED

V.

20 JOINT CARGO SERVICES PTY. LIMITED & ANOR.

The Plaintiff by MARY ELIZABETH THOMSON its solicitor joins issue with the first Defendant upon the first Defendant's Pleas herein save insofar as the Pleas admit the delivery to the first Defendant of the Plaintiff's said goods.

2. And for a second Replication as to the eighth, ninth and tenth Pleas the Plaintiff
30 says that the first Defendant is not entitled to the benefit of the terms or conditions of the Bill of Lading referred to in the said Pleas for the reason that the first Defendant was not a party to the contract therein recorded.

3. And for a third Replication as to the eighth, ninth and tenth Pleas the Plaintiff says that if the first Defendant is entitled to the benefit of the clauses of the Bill of
40 Lading referred to in the said Pleas, which the Plaintiff does not admit, the first Defendant is only entitled to the benefit of such clauses if and insofar as the loss of the Plaintiff's goods occurred during or in the course of the performance by the first Defendant of the duties and obligations arising under the contract evidenced by the said Bill of Lading and the Plaintiff further says that the Plaintiff's said goods were not
50 lost during or in the course of the performance by the first Defendant of the duties and obligations arising under the contract evidenced by the said Bill of Lading or in the alternative at the time when the said contract was still on foot whereby the first Defendant cannot

claim the benefit of the said clauses in these proceedings.

4. And for a fourth Replication as to the eighth, ninth and tenth Pleas the Plaintiff says that if the first Defendant is entitled to the benefit of the clauses of the Bill of Lading referred to in the said Pleas, which the Plaintiff does not admit, the first Defendant is only entitled to the benefit of such clauses if the first Defendant at the time of the loss of the Plaintiff's goods was performing its duties and obligations arising under the contract evidenced by the bill of lading and if the first Defendant was not in breach of any fundamental term of the said contract and the Plaintiff says that the first Defendant was in breach of a fundamental term of the said contract namely the delivery by the first Defendant of the Plaintiff's goods without the authority of the Plaintiff to a person or persons having no title or claim to possession of the said goods as a result of which the said goods were lost whereby the first Defendant is precluded from relying upon and not entitled to rely upon the benefit of the said clauses of the Bill of Lading.

REPLICATION to Amended Pleas of second Defendant dated: 3rd day of April, 1975

SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED

V.

PORT JACKSON STEVEDORING PTY. LIMITED & ANOR.

The Plaintiff by MARY ELIZABETH THOMSON its solicitor joins issue with the second Defendant upon the second Defendant's Pleas herein save insofar as the Pleas admit the delivery to the second Defendant of the Plaintiff's said goods.

2. And for a second Replication as to the eighth, ninth and tenth Pleas the Plaintiff says that the second Defendant is not entitled to the benefit of the terms or conditions of the Bill of Lading referred to in the said Pleas for the reason that the second Defendant was not a party to the contract therein recorded.

3. And for a third Replication as to the eighth, ninth and tenth Pleas the Plaintiff says that if the second Defendant is entitled to the benefit of the clauses of the Bill of Lading referred to in the said

Pleas, which the Plaintiff does not admit, the second Defendant is only entitled to the benefit of such clauses if and insofar as the loss of the Plaintiff's goods occurred during or in the course of the performance by the second Defendant of the duties and obligations arising under the contract evidenced by the said Bill of Lading and the Plaintiff further says that the Plaintiff's said goods were not lost during or in the course of the performance by the second Defendant of the duties and obligations arising under the contract evidenced by the said Bill of Lading or in the alternative at the time when the said contract was still on foot whereby the second Defendant cannot claim the benefit of the said clauses in these proceedings.

4. And for a fourth Replication as to the eighth, ninth and tenth Pleas the Plaintiff says that if the second Defendant is entitled to the benefit of the clauses of the Bill of Lading referred to in the said Pleas, which the Plaintiff does not admit, the second Defendant is only entitled to the benefit of such clauses if the second Defendant at the time of the loss of the Plaintiff's goods was performing its duties and obligations arising under the contract evidenced by the Bill of Lading and if the second Defendant was not in breach of any fundamental term of the said contract and the Plaintiff says that the second Defendant was in breach of a fundamental term of the said contract namely the delivery by the second Defendant of the Plaintiff's goods without the authority of the Plaintiff to a person or persons having no title or claim to possession of the said goods as a result of which the said goods were lost whereby the second Defendant is precluded from relying upon and not entitled to rely upon the benefit of the said clauses of the Bill of Lading.

THIRD PARTY NOTICE of firstnamed Defendant filed: 28th day of April, 1972.

NOTICE OF APPEARANCE of secondnamed Defendant to Third Party Notice of firstnamed Defendant entered:

DECLARATION OF THIRD PARTY CLAIM BY FIRST-NAMED DEFENDANT dated: 25th day of May, 1972.

JOINT CARGO SERVICES PTY. LIMITED the first-named Defendant a company duly incorporated and entitled to sue in and by its corporate name or style by JOHN KING BOWEN its Solicitor sues PORT JACKSON STEVEDORING PTY. LIMITED

the secondnamed Defendant a company duly incorporated and liable to be sued in and by its corporate name or style FOR THAT there were delivered to the secondnamed Defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the secondnamed Defendant for the plaintiff for reward to the secondnamed defendant and the secondnamed defendant received and had the said goods in its care and keeping for the purpose and upon the terms aforesaid YET the second named defendant kept the said goods in a negligent manner and took no care of the same WHEREBY they were wholly lost to the plaintiff AND thereafter the plaintiff sued the defendants herein alleging that the said goods were delivered to the defendants to be safely kept and taken care of by the defendants for the plaintiff for reward to the defendants and the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid YET the defendants kept the said goods in a negligent manner and took no care of the same WHEREBY they were wholly lost to the plaintiff AND the firstnamed defendant now claims to be entitled to a contribution or complete indemnity in respect of any sum which the plaintiff may recover in this action against it to the extent of any such amount as may be found to be just and equitable having regard to the secondnamed defendant's responsibility for such loss by reason of the breaches hereinbefore alleged and in accordance with the Statute in such case made and provided.

2. And for a second count the firstnamed defendant as aforesaid also sues the secondnamed defendant FOR THAT there were delivered to the second named defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the secondnamed defendant for the plaintiff and the secondnamed defendant received and had the said goods in its care and keeping for the purpose and on the terms aforesaid YET the secondnamed defendant kept the said goods in a negligent manner and took no care of the same WHEREBY they were wholly lost to the plaintiff AND thereafter the plaintiff sued the defendant herein alleging that there were delivered to the defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the defendants for the plaintiff and the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid YET

the secondnamed defendant kept the said goods in a negligent manner and took no care of the same WHEREBY they were wholly lost to the plaintiff AND thereafter the plaintiff sued the defendant herein alleging that there were delivered to the defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the defendants for the plaintiff and
10 the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid YET the defendants kept the said goods in a negligent manner and took no care of the same WHEREBY they were wholly lost to the plaintiff AND the firstnamed defendant now claims to be entitled to a contribution or complete indemnity as more particularly set out in the first count hereof.

20 PARTICULARS UNDER ORDER X RULE 7A

The cartons of goods referred to in the particulars under Order X Rule 7A filed by the plaintiff were delivered into the custody of the second defendant at No.2 Wharf Shed, Glebe Island, on or about the 12th May, 1970 from the S.S. "New York Star" and while in such custody were on or about 13th May, 1970 stolen by a person or persons unknown. It will be alleged that
30 the second defendant failed to safely keep and take care of the goods and kept them in a negligent manner and took no care of them in that the goods were stolen whilst in such custody.

PLEAS of secondnamed defendant to Declaration of Third Party Claim of firstnamed Defendant filed: 18th day of September, 1972.

PORT JACKSON STEVEDORING PTY. LIMITED

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JOINT CARGO SERVICES PTY.LIMITED

1. The Third Party by ANTONY TUMNER MARTIN its attorney says that it is not guilty as alleged.

2. AND for a second plea the Third Party as to so much of the first count of the Declaration of Third Party claim by first named defendant as alleges that there were delivered to the secondnamed defendant
50 certain cartons of goods of the plaintiff to be safely kept and taken care of by the second named defendant for the plaintiff for reward to the second named defendant and the second named defendant received and had the said goods in its care and keeping for

In the Supreme Court of New South Wales

No.1
Amended Issues for Trial

8th April 1975

(continued)

the purpose and upon the terms aforesaid denies the allegations and each of them.

3. AND for a third plea the Third Party as to so much of the second count of the Declaration of Third Party claim by the first named defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the second named defendant for the plaintiff and the second named defendant received and had the said goods in its care and keeping for the purpose and on the terms aforesaid denies the allegations and each of them.

REPLY of firstnamed Defendant to Third Party Pleas of secondnamed Defendant filed: 19th day of February, 1973

JOINT CARGO SERVICES PTY. LIMITED

v.

PORT JACKSON STEVEDORING PTY. LIMITED

The firstnamed defendant joins issue with the Third Party on its Third Party Pleas herein.

THIRD PARTY NOTICE of secondnamed Defendant filed: 16th day of March, 1972.

NOTICE OF APPEARANCE of firstnamed Defendant to Third Party Notice of secondnamed Defendant entered: 9th day of May, 1972.

DECLARATION AND PARTICULARS UNDER ORDER X RULE 7A OF THIRD PARTY CLAIM BY SECONDNAMED DEFENDANT dated: 18th day of September, 1972.

PORT JACKSON STEVEDORING PTY.LIMITED the second named defendant a Company duly incorporated and entitled to sue in and by its corporate name and style by ANTONY TUMNER MARTIN its attorney sues JOINT CARGO SERVICES PTY. LIMITED the first named defendant a Company duly incorporated and liable to be sued in and by its corporate name and style for that there were delivered to the firstnamed defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the first named defendant for the plaintiff for reward to the firstnamed defendant and the firstnamed defendant received and had the said goods in its care and keeping for the purpose and upon the terms aforesaid yet the firstnamed

defendant kept the said goods in a negligent manner and took no care of the same whereby they were wholly lost to the plaintiff and thereafter the plaintiff sued the defendants herein alleging that the said goods were delivered to the defendants to be safely kept and taken care of by the defendants for the plaintiff for reward to the defendants and the
10 defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid yet the defendants keptthe said goods in a negligent manner and took no care of the same whereby they were wholly lost to the plaintiff and the second named defendant now claims to be entitled to contribution or complete indemnity in respect of any sum which the plaintiff may recover in this action against
20 it to the extent of any such amount as may be found to be just and equitable having regard to the first named defendant's responsibility for such loss by reason of breaches hereinbefore alleged and in accordance with the statute in such cases made and provided.

2. AND for a second count the secondnamed defendant as aforesaid also sues the first named defendant for that there were delivered
30 to the first named defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the first named defendant for the plaintiff and the first named defendant received and had the said goods in its care and keeping for the purpose and on the terms aforesaid yet the first named defendant kept the said goods in a negligent manner and took no care of the same whereby they were wholly lost to the
40 plaintiff and thereafter the plaintiff sued the defendants herein alleging that there were delivered to the defendants certain cartons of goods of the plaintiff to be safely kept and taken care of by the defendants for the plaintiff and the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid yet the defendants kept the same in a negligent manner and took no care
50 of the same whereby they were wholly lost to the plaintiff and the second named defendant now claims to be entitled to contribution or complete indemnity as more particularly set out in the first count hereof.

PARTICULARS UNDER ORDER X RULE 7A

The cartons of goods referred to in the particulars under Order X Rule 7A filed by the plaintiff were delivered into the

custody of the first named defendant prior to 12th May, 1970 and whilst in such custody they were stolen on or about 13th May, 1970 by a person or persons unknown from the vicinity of No.2 Wharf Glebe Island. It will be alleged that the first named defendant failed to safely keep and take care of the goods and kept them in a negligent manner and took no care of them in that the goods were stolen in such custody. 10

PLEAS of firstnamed Defendant to Declaration of Third Party Claim of secondnamed Defendant filed: 19th day of February, 1973.

JOINT CARGO SERVICES PTY. LIMITED

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PORT JACKSON STEVEDORING PTY. LIMITED 20

The Third Party Joint Cargo Services Pty. Limited by JOHN KING BOWEN its Solicitor says that it is not guilty.

2. And for a second plea the Third Party as to so much of the first count of the secondnamed Defendant's Declaration of Third Party Claim as alleges that there were delivered to the firstnamed defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by 30 the firstnamed defendant for reward to the firstnamed defendant and the firstnamed defendant received and had the said goods in its care and keeping for the purpose and upon the terms aforesaid denies the said allegations and each and every one of them.

3. And for a third plea the Third Party as to so much of the second count of the secondnamed defendant's declaration of 40 Third Party Claim as alleges that there were delivered to the firstnamed defendant certain cartons of goods of the plaintiff to be safely kept and taken care of by the firstnamed defendant for the plaintiff and the firstnamed defendant received and had the said goods in its care and keeping for the purpose and on the terms aforesaid denies the said allegations and each and every one of them. 50

REPLY of second named Defendant to Third Party Pleas of firstnamed Defendant filed: 2nd day of May, 1973.

JOINT CARGO SERVICES PTY. LIMITED

v.

PORT JACKSON STEVEDORING PTY.LIMITED

The secondnamed Defendant joins issue with the Third Party on its Third Party Pleas herein.

DATED this 8th day of April 1975.

Signed:

Solicitor for the Plaintiff,
10 86-88 Pitt Street,
Sydney

In the Supreme Court of New South Wales

No.2
Transcript of Evidence given before His Honour Mr.Justice Sheppard

9th and 10th April 1975

No. 2

TRANSCRIPT OF EVIDENCE
GIVEN BEFORE HIS HONOUR
MR. JUSTICE SHEPPARD
9th and 10th April 1975

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COMMON LAW DIVISION)
COMMERCIAL LIST)

OFFICE COPY
10 APR 1975

CORAM: SHEPPARD, J.
WEDNESDAY, 9TH APRIL, 1975

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SALMOND & SPRAGGON (AUSTRALIA)
PTY LIMITED

v.

JOINT CARGO SERVICE PTY.LIMITED
& ANOR.

MR. SHELLER, Q.C. with MR. ROLFE appeared
for the plaintiff.
MR. GLEESON, Q.C. with MR. RAYMENT appeared
for the first defendant
MR. PARKER appeared for the second defendant

20

MR. GLEESON: For the purpose of the record, in relation to the Ninth Plea of the first defendant - I would guess the same goes for the second defendant - at p.9 of the amended issues for trial; your Honour may recollect the history of the matter was that the plaintiff first pleaded the case on the basis that the declaration contained counts alleging negligence as a bailee against both defendants, or alternatively, and what is now the Ninth plea was originally drawn in answer to those two counts. Subsequently the plaintiff filed an amended declaration in which it added counts broadly speaking for misdelivery and for non-delivery and the view was taken and still is taken that what is now the Ninth plea would stand as an answer for these claims for misdelivery and non-delivery also; although in relation to those counts the concluding words, that is to say "The said goods were lost due to theft or pilferage after leaving the ship's tackle" are probably otiose.

30

40

These additional facts were alleged in relation to the count not talking about

negligence but in relation to the counts talking about non-delivery and misdelivery. The allegations of non-delivery and misdelivery appear in the declaration itself and I just wanted to make it clear that in relation to that Ninth plea we not only rely on that part of the exemption clause which talks about theft and pilferage, we also rely on the concluding part of the exemption clause which says "The carrier shall not be liable in any capacity whatever for any non-delivery or misdelivery."

10

If one were pleading that clause to a declaration for only general allegations of non-delivery or misdelivery one would simply plead the terms of the exempting clause and not add any additional fact. The additional fact we have added is really only to the counts concerning negligence as distinct from non-delivery and misdelivery.

20

HIS HONOUR: It is a plea to such of the two counts?

MR. GLEESON: Yes, but insofar as it is a plea to the third, fourth, fifth and sixth counts the words "The said goods were lost due to theft or pilferage after leaving the ship's tackle" may be otiose.

HIS HONOUR: Is that clear?

30

MR. SHELLER: Yes. I had assumed the defendants would rely insofar as the amended counts of the declaration were concerned on the exempting clause insofar as it exempts for non-delivery or misdelivery. I do not know whether that is what my friend said.

MR. GLEESON: That is the intention.

MR. SHELLER: The plea merely says the goods were lost due to theft or pilferage and I suppose one would read in after that "Or were misdelivered or were not delivered". It presents me with no problem. Whether your Honour would wish to have the pleading amended I do not know.

40

MR. GLEESON: As a matter of strict pleading it should not be pleaded because the allegation is in the declaration itself.

In the Supreme Court of New South Wales

No.2
Transcript of Evidence given before His Honour Mr.Justice Sheppard

9th and 10th April 1975

(continued)

HIS HONOUR: You mean therefore the clause speaks for itself?

MR. GLEESON: Yes.

HIS HONOUR: I think we can leave it for the time being. If there is any problem we can clear it up later on.

MR. GLEESON: In relation to the replication, the replication raises argumentative matters of law and does not add any matter of fact to the declaration. We do not mind that and as far as we are concerned we are happy for the replication to take its existing form, it being understood we are not called upon to plead to it and insofar as I do not think it alleges any matter of fact that did not already appear from the previous pleadings but insofar as it does or raises arguments of law we are at issue. It states in a very convenient form the legal answers that the plaintiff makes to our pleas. 10 20

HIS HONOUR: Is Mr. Parker's ninth plea in the same form?

MR. PARKER: Yes. I wish to adopt Mr. Gleeson's remarks about the attitude of the second named defendant to the replication.

HIS HONOUR: You are in exactly the same position.

MR. PARKER: In that sense we are.

HIS HONOUR: I take it subject to what you said, the matter proceeds on the amended issues for trial dated 8th April last? 30

MR. SHELLER: Yes.

(Mr.Sheller opened to his Honour)

(Bill of Lading tendered and marked Ex.A)

(Copy customs invoice tendered and marked Ex.B)

(It was agreed the value of the goods subject to the claim is $14,648.98)

(Commercial invoice tendered and marked part of Ex.B) 40

In the Supreme Court of New South Wales

No.2 Transcript of Evidence given before His Honour Mr. Justice Sheppard

9th and 10th April 1975

(continued)

(Packing list tendered and marked part of Ex.B)

(Letters dated 1st July, 1970, and 20th August, 1970, passing between L.F.Ferris & Company and the first defendant tendered and marked Ex.C. Admitted only against first defendant)

(First page of cargo delivery book together with entry described as "St. John 347" under the letter S in the cargo delivery book tendered and marked Ex.D)

(Mr.Sheller called on the second defendant to produce letter of 23rd March, 1971, from Joint Cargo Services to Captain Armitage, Port Jackson Stevedoring and any annexures thereto. Documents produced. Mr. Parker stated he did not make a claim for privilege.)

(Mr.Sheller called for letter of 30th March, 1971, and copy of letter 30th March, 1971, from Port Jackson Stevedoring to J.Ralph. Document produced)

(Mr.Sheller called for letter of 15th April from C.T.Bowring & Swain to Port Jackson Stevedoring. Document produced)

(Mr.Sheller called for letter of 27th April, 1971, from Port Jackson Stevedoring to Mr.H.Dean of Joint Cargo Services. Document produced)

(The abovementioned documents called for were tendered and were objected to by Mr. Parker and Mr.Gleeson with the exception of a copy judgment of the Privy Council. Its tender was withdrawn and the documents marked 1 for identification.)

(Copy of notice to admit facts to first defendant together with letters from Ebsworth & Ebsworth to Kearney, Boyd & Jones dated 15th October, 1974, tendered and marked Ex.E)

(Notice to admit facts and notice disputing facts forwarded to second defendant tendered and marked Ex.F)

In the Supreme Court of New South Wales

NO.2
Transcript of Evidence given before His Honour Mr.Justice Sheppard

9th and 10th April 1975

(continued)

(Copy letter from Messrs. Kearney, Boyd & Jones dated 10th October, 1974, to Messrs. Dare, Read, Martin and Grant and reply dated 4th March, 1975, together with attachment headed "Port Jackson Stevedoring Pty.Limited; basic terms and conditions for stevedoring in Sydney" tendered and marked Ex.G. Admitted against second defendant only)

MR. SHELLER: The Maritime Services Board was subpoenaed to produce certain documents. Mr.Clark, a solicitor in the office of the Solicitor of the Maritime Services Board attends in answer to that subpoena and I anticipate there is some problem in producing the documents. I would seek at this stage to call for the documents on subpoena and Mr. Clark could perhaps tell your Honour what the situation is. 10

DAVID BREMNER CLARK
(not sworn): 20

MR. SHELLER: Q. What is your full name? A. David Bremner Clark.

Q. Are you a solicitor employed by the Maritime Services Board of New South Wales? A. I am.

Q. Do you attend here in answer to a subpoena addressed to the Maritime Services Board dated 14th October, 1974? A. I do.

Q. Do you have that subpoena? A. I have the subpoena. 30

Q. Do you have the document referred to in the subpoena? A. I do not have it with me, no.

Q. Can you tell his Honour what was done with those documents after that subpoena was received? A. The subpoena was received in October last year and the file was prepared and referred to the various branches of the Board responsible for maintaining all the records required. The records were collected together in a file. We were then advised the matter had been adjourned and would not be dealt with by the Court until today. Subsequently the file was re-submitted to me on 6th March. I took the various documents from the file, handed them to an articled 40

clerk in the Board's office with instructions to produce them at the Prothonotary's office. He I believe went and did that. He came back some days later and reported to me they had been produced. Inquiries from the office in fact indicate there is no record of them having been produced there. I made a further search at the Board yesterday from the various branches. They have not had the records returned to them. I checked at the District Court. The records were not produced there in mistake. I cannot think of any other place where the documents could be.

HIS HONOUR: Q. Is the articled clerk still with you? A. He is still with the Board. He is at present on leave studying for examinations.

Q. Do you know the date when he said he delivered them? A. I cannot tell you the date exactly but I can say it would be some time between 10th March and the 18th March. I wrote to the solicitor for the plaintiff on the 10th March advising that arrangements were in hand for the production of the documents. I have made a note on the file the documents had been produced. That note was made on the 18th March. I only presume it would have been some time between those two dates.

Q. Without of course suggesting any reflection on him is he experienced enough to know in your view where the Common Law Office is? A. I would say so. He has done this job on a number of occasions in the past.

Q. He is not likely to have been confused by one of the other Court offices? A. I don't know.

HIS HONOUR: I will have some inquiries made at the office myself. My associate will speak to Mr. Lynch and we will make some further inquiries here and see what can be done.

Q. Are the documents very extensive, are they bulky? A. They would have constituted a file approximately half an inch thick. There were not that many of them but they were fairly voluminous.

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(continued)

MR. SHELLER: If the documents do not turn up I will be seeking possibly after lunch to call Mr. Clark to give evidence as to the nature of those documents. I don't know what my friends' reaction will be to that.

MR. GLEESON: As far as we are concerned we would have no objection to Mr. Clark doing that right now. I do not know that there is any dispute about any of these documents. We for our part would regard it as extremely regrettable if the case went off in any way on the plaintiff's inability to produce them. 10

HIS HONOUR: Is it possible to come to some agreement or make some admissions which would indicate their effect?

MR. PARKER: I have not spoken to Mr.Sheller to find out what the documents contain. I would seek to adopt the general approach we could agree. 20

HIS HONOUR: It might be possible to formulate some admissions which will get over the problem.

Mr.Clark, I will excuse you for the time being. There is nothing you can suggest we can do other than what has been done.

MR. CLARK: No, there is nothing more that I can think could have happened. I did check the clerk's desk. There is no evidence of the documents being left there. There is no receipt being provided for the documents that I can find. 30

MR. SHELLER: There is one document Mr.Clark does produce. Perhaps he could identify it.

MR. CLARK: It is a photostat copy of the application for berth which was lodged with the Board in respect of the vessel.

MR. GLEESON: I will be calling as a witness the Assistant Marine Superintendent of the first-named defendant whose job it was to arrange for the berth to be made available for the vessel. 40

(Photostat copy of application for vessel berth tendered)

KENNETH PATTERSON
sworn and examined:

MR. SHELLER: Q. Is your full name Kenneth Patterson? A. Yes.

Q. Do you reside at 8 Weemala Road, Northbridge? A. Yes.

Q. In May 1970 were you employed as company secretary and director of the plaintiff Salmond & Spraggon (Australia) Pty. Limited? A. Yes.

10

Q. I think at that time you had been employed as company secretary by that company for approximately ten years? A. That is right.

Q. Is it right that you are now employed by Reed, Paper Products Limited as a divisional accountant? A. That is correct.

Q. You are aware are you not that in May 1970 a consignment of some thirty-seven cartons of razor blades was purchased by your company from Schick in Canada? A. That is correct.

20

Q. I think at that time your company had a franchise for Schick in Australia? A. That is right.

Q. (Showing Exs. A and B) Firstly do you recognise Ex.A as the bill of lading in respect to that consignment of razor blades? A. Yes I do.

30

Q. Do you recognise the documents in Ex.B as the customs invoice, commercial invoice and packing list in respect of that consignment? A. Yes. It is a copy of the customs invoice and the originals of the other two documents.

Q. As company secretary of the plaintiff in 1970 were those documents given to you personally? A. Yes or would have come through the mail to me personally.

40

Q. They came through the mail to you personally? A. Yes.

Q. In any event you sighted them at that time? A. Yes, that would be right.

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Plaintiff's Evidence

Kenneth Paterson
Examination

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Plaintiff's evidence

Kenneth Patterson

Examination (continued)

Q. It was your duty to do something with respect to them, is that correct? A. That is correct.

Q. What was your duty with respect to them? A. I would distribute them to the people concerned to do the follow-up and clear the goods.

Q. Was one of these persons the customs agent L.F.Ferris & Company? A. I would pass them on to the purchasing officer of Salmond & Spraggon who in turn would pass them on to Ferris. 10

Q. Were these the customs agents employed by the plaintiff? A. That is correct.

Q. At that time did Salmond & Spraggon use a firm of carriers P.G.Pemble & Sons? A. That is right.

Q. Look at the document now shown to you. Do you recognise that as a copy of the entry for home consumption with respect to cartons of razor blades? A. Yes. 20

Q. In so far as those razor blades were concerned were they to be brought from the wharf into the plaintiff's store? A. Yes.

Q. And accordingly that entry was prepared, is that correct? A. That is right.

(Document re entry for home consumption tendered and marked Ex.H)

Q. The plaintiff's warehouse at that time was situated in Loyalty Road, North Rocks? A. Yes. 30

Q. If you would look at the document, the copy of the customs invoice, you will observe that the contract was stated to be sixty days net, two per cent thirty days after arrival of merchandise, C.I.F. Sydney? A. Yes.

Q. At that time in May 1970 and thereafter was there some standard method by which payment was made to the shipper, the Schick Safety Razor Company, by the plaintiff? A. Yes. 40

Q. What was that system? A. Where possible we availed ourselves of the two per cent cash

discount and paid within thirty days of arrival of the vessel and otherwise we would pay within sixty days.

Q. How was that payment made? A. By draft.

Q. It was a draft which you obtained from the Bank of New Zealand? A. That is correct.

Q. And sent by post to the consignor? A. We sent it by post, that is correct.

HIS HONOUR: I am informed by my associate she has spoken to Mr. Lynch in the Common Law Office. He confirms what Mr. Clark said and also there is no subpoena there. He understands the Maritime Services Board still have the subpoena and that leads him to the conclusion the probabilities are that the documents were not in fact produced to the Common Law Office as it is the practice of the office to require the subpoena to be produced with the documents.

MR. SHELLER: I do not know what your Honour's attitude would be with respect to the subpoena. I can discuss with my friends this matter and I could obtain everything that I could obtain from the subpoena. The problem in so far as the plaintiff is concerned has been trying to locate these documents which in fact we have spent some time trying to do in the last few days. I am only concerned with the contents or an admission of the contents and I am not concerned if I get an admission of the answers to the subpoena.

MR. GLEESON: It may be that when my learned friend has had the opportunity to hear evidence-in-chief that I call and has the opportunity to cross-examine my witnesses his problems will disappear entirely. In any event so far as I am concerned I don't mind if he postpones his decision as to what further evidence he wants and calls that matter only in reply.

MR. PARKER: I adopt that attitude too.

MR. GLEESON: No questions.

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Plaintiff's evidence

Kenneth Patterson

Cross-examination

CROSS-EXAMINATION:

MR. PARKER: Q. Can you recall precisely when the bill of lading was received by your company? A. Not precisely, no.

Q. Did you say P.J.Pemble & Sons were the carriers? A. They were the carriers for Salmond & Spraggon, yes. They did all Salmond & Spraggon's carrying at that time.

Q. Do you have any personal knowledge of whether they were instructed by your company to collect certain goods at No.2 Glebe Island? A. It was the usual practice for them to be contacted by Ferris, our customs agent, to do that. 10

Q. That is something you left to your customs agent? A. Yes.

(Witness retired)

Stanley Lamb Dooner

Examination

STANLEY LAMB DOONER sworn and examined:

MR. SHELLER: Q. Is your full name Stanley Lamb Dooner and do you live at 109 Warren Road, Marrickville? A. That is correct. 20

Q. Are you at the present time transport manager with P.J.Pemble & Sons? A. Correct.

Q. Have you been employed by that firm for a period of approximately forty years? A. That is correct.

Q. In May 1970 did P.J.Pemble & Sons act as carriers for Salmond & Spraggon? A. They did. 30

Q. And from time to time collected consignments from the wharves on behalf of Salmond & Spraggon? A. That is correct.

Q. Do you recollect in May 1970 receiving a bill of lading in respect of some safety razor blades? A. I picked it up from Ferris, the customs agent.

Q. You picked it up from Ferris the customs agent? A. Yes, the bill of lading.

Q. (Showing Ex.A) A. Yes, that is the type of thing I collected. 40

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Plaintiff's evidence

Stanley Lamb Dooner

Examination (continued

Q. Was that the normal practice when you were to collect goods from the wharves that you were supplied by the customs agent with the appropriate bill of lading? A. Yes.

Q. Is that correct? A. Yes, to take this to the wharf to collect the goods.

Q. Endorsed with an order for delivery? A. That is correct.

Q. On this occasion what happened when you received that bill of landing? A. We found that we were too busy to handle this particular shipment so I contacted another carrier and asked him could he do it for us.

10

Q. Who was that carrier? A. W. Campbell & Sons.

Q. Did you hand over that bill of lading to Mr. Campbell to enable him to obtain the goods? A. Yes, we passed the bill on to them so they could get delivery from the wharf.

20

CROSS-EXAMINATION

Cross-Examination

MR. GLEESON: No questions.

MR. PARKER: Q. You were shown the bill of lading? A. Yes.

Q. You said that was the type of thing you collected? A. That is right. The normal bill of lading.

Q. Are you familiar with any of the clauses on the back of the bill of lading? A. No, I have not read those, there are too many.

30

Q. When did you ask Campbell & Sons to look after this? A. I think I rang that evening or the next morning because we were too busy to do the job.

Q. What day would that have been? A. It would have been the same day or the next day after I collected the bill.

Q. When was that? A. I can't think of

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Stanley Lamb Donner Cross-Examination (continued)

the dates. Round about the 13th or 14th of the month some time.

Q. Did you do this personally or did someone in your firm do it? A. I done the contracting with Campbell's personally and handed the paper work over to them.

Q. Did you give them certain instructions? A. I told them where they had to collect from and where they had to be taken to.

Q. Were you concerned as to how they would do it, how many men they would have? A. They have done work for us before. I knew they would be able to handle it. 10

Q. Did you suggest any number of men should go down? A. No, I just handed the papers to Campbell and told them to look after the job for us.

Q. You left that to Campbell's discretion about how they would actually arrange the thing? A. That was their own problem. I gave them the bill for them to look after it. 20

(Witness retired and excused)

Alan Henry Bowdler Examination

ALAN HENRY BOWDLER, sworn and examined:

MR. SHELLER: Q. Is your full name Alan Henry Bowdler? A. Yes.

Q. Do you reside at Walgrove Flats, Annandale Street, Annandale, and are you by occupation a watchman No.359? A. Yes. 30

HIS HONOUR: Q. That is a medal number? A. Yes, that is my medal number.

MR. SHELLER: Q. For how long have you been a watchman? A. Twelve years.

Q. Do you recollect in May 1970 being picked up at the pick-up centre in York Street, Sydney, to go to No.2 Wharf, Glebe Island? A. Yes.

Q. That was for the unloading of a vessel called the New York Star? A. Yes. 40

Q. Who picked you up at the pick-up centre in York Street? A. Mr.George Hurst.

Q. Who is Mr. George Hurst? A. He was the gentleman who used to pick us up from Port Jackson, used to pick watchmen up if they wanted any casual men.

Q. He was in fact the head watchman of Port Jackson? A. Yes.

Q. Do you remember what time of the day you were initially picked up for this job? A. 7 o'clock in the morning.

Q. Was the system that you were picked up for the whole unloading of this vessel? A. Not the whole unloading. Only on day shift, not the twilight or any other shift, unless they were short-handed and I could work until 11 o'clock.

Q. The day shift was 7 a.m. to 3 p.m.? A. That is right.

Q. You were picked up for the day shift during the whole of this unloading of the vessel? A. Yes.

Q. When you were picked up at 7 a.m. what did you do after that? A. I got straight over and picked the keys up at the check point, the keys opened up the shed to let in the wharf labourers to start.

Q. From whom did you pick that up? A. From the check point Glebe Island.

Q. Is that from the permanent watchman there? A. From the permanents. They are employed by Cargo Control.

Q. What keys were these? A. The keys to open up the shed, the dead house and the delivery office.

Q. You then took the keys and opened up the shed and opened up the dead house? A. All ready for the cargo to be discharged.

Q. This was No.2 wharf Glebe Island? A. Yes.

Q. I take it when you opened up the wharf on the first occasion this was before the

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Alan Henry Bowdler

Examination (continued)

discharge of the vessel commenced?
A. Yes.

Q. Do you remember a cargo of razor blades being discharged off this vessel? A. Yes. Most of them came out of No.1 hatch.

Q. Do you remember if they were marked with the letters S & S? A. Yes, and also a number.

Q. Do you remember where those cartons of razor blades were placed on the wharf? A. Yes, inside the dead house. 10

Q. HIS HONOUR: Perhaps you had better describe what the dead house is? A. They call it the dead house where they put all the good stuff, stuff that has been pillaged on the boat - they put all the good stuff into the dead house, what they call the dead house, in a partitioned off part of the shed.

MR. SHELLER: Q. That is the dead house? A. The dead house. 20

HIS HONOUR: Q. You say all the good stuff? A. Yes, all the good stuff. Anything that has been pillaged. That goes in what they call the dead house.

Q. I don't understand what you mean by good stuff? A. Razor blades and that are good stuff, transistors, things like that.

Q. You mean things that are more likely to be stolen than other things? A. Yes. Anybody could walk through the shed and you cannot keep your eyes open everywhere if there are too many people walking about. 30

Q. It is consignments made up of goods which are thought more likely to be pilfered than other goods? A. That is correct.

Q. Together with all the broken goods which have been found to have been interfered with on the voyage? A. Yes. 40

MR. SHELLER: Q. In this particular case do you recollect whether some cartons had been set aside for survey? A. Yes.

Q. About how many? A. There were three or

four. It is five years ago and it is a bit hard to remember back.

Q. There were three or four cartons set aside in the dead house for survey? A. Yes.

Q. As a result of some suspected pilferage? A. That is right.

HIS HONOUR: Q. You say all the cartons came off the ship? A. Yes.

MR. SHELLER: Q. To make it plain, all thirty-seven cartons were in the dead house but three or four had been set aside separately for survey in the dead house? A. Yes.

Q. During the shift from 7 a.m. to 3 p.m. what were your duties on the wharf? A. I was the supervising watchman.

Q. Where did you as it were place yourself to perform those duties? A. Outside the dead house and I also had a watchman outside the dead house if I went away looking through the shed to see if there was any stuff pillaged in the shed.

Q. Did you yourself have the keys to the dead house? A. Yes.

Q. And in effect would it be true to say you were in charge of the dead house? A. That is right.

Q. Do you remember at about lunchtime on that day on which you were at the wharf somebody coming into the dead house with respect to these razor blades? A. Yes, came to the door of the dead house.

Q. Did he have something with him? A. He had some papers in his hand. He said, "I have come for the S and S razor blades". Can I say what I said?

HIS HONOUR: You have not been stopped yet.

WITNESS: I said, "Thank Christ you come to get them. They are a nuisance, specially at Glebe Island."

MR. SHELLER: Q. Did you say anything to him about what he should do? A. Yes. I said, "Have you got your papers?". He said, "Yes."

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Alan Henry Bowdler

Examination (continued)

He had some papers in his hand which looked like papers. I could not take them out of his hand to look at them. I said, "Would you go in the delivery office and check up with the head clerk, come back here and get the watchman to take the numbers of the ones you are going to take, the cartons you are going to take and also get a Tally into the dead house."

Q. What did he do then? A. I watched him got out of the door of the wharf out to the delivery office and naturally I thought he had gone around to the delivery office and when he came back I said, "Have you seen the head clerk?" He said, "Yes." I said, "All right, get a Tally and take the numbers of the ones that are not pillaged which you are taking." Naturally he didn't have to show me anything. All I had to say, which I have always done up to date and I still do it is, "Have you been to the delivery office?". I said to him, "There are three Tallies sitting over there in the sun. Get one of them to come over here and check the numbers." 10 20

Q. Did he go over? A. He went over to the Tally and I seen him go to the Tally clerk. I seen the Tally clerk nod his head. He could have said, "What's it like sitting in the sun?" or something like that. 30

Q. Having seen the Tally clerk nod his head this man came back to you then? A. Then he came back and started to wheel the big cartons out.

Q. What did he do when they wheeled them out? A. They were loading on to a truck, two of them, two men.

Q. Did you observe all the thirty-three cartons being wheeled out of the dead house? A. Yes. I interrupted again and I said, "What's your Tally doing? He should be checking numbers. He should be over here taking the numbers." I have often had an argument when Tallies would not come to the dead house. I cannot get them by the hand and drag them into the dead house. 40

Q. I think the Glebe Island No.2 Wharf has been demolished? A. Yes, it has finished.

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Plaintiff's evidence

Alan Henry Bowdler

Examination (continued)

Q. Assuming that this table represents the wharf shed as it was in 1970 the dead house is an area - A. Straight along the side of you at that end of the table.

Q. The wharf front and water is towards his Honour? A. This side and the road side on the other side.

Q. The dead house is within the wharf shed? A. Yes, the end of the wharf shed.

10 Q. Whereabouts is the delivery office where the delivery clerk is? A. Around behind the dead house, practically around behind it, on the side of it where the part of the side of the dead house faces out to the road.

Q. When this man left you to go as you thought to the Tally clerk, he came out of the wharf shed and disappeared from your view? A. That is right.

Q. He then returned and you saw him speak
20 to the tally clerks? A. Yes.

Q. When you saw him load the cartons on to the truck where was the truck as you recollect? A. I could see it from where I was in the dead house. I would be here and the truck was there. I was standing at the doorway.

Q. You were at the door of the dead house? A. And I could see.

Q. The truck was on the - A. The first door.

30 Q. The first door in the side of the wharf shed away from the water? A. That is right, on the road side.

Q. Did these two men load all the cartons on to the truck except the four that had been set aside for survey? A. That is right.

Q. You were present while this took place? A. Yes, also a customs officer.

Q. In the dead house? A. In the dead house. Nick Peters is his name.

40 Q. Do you recollect that this incident you described took place on 14th May, 1970? A. I cannot tell you that.

Q. Do you recollect whether the cartons of razor blades had been discharged from the vessel on some day prior to this day? A. Yes, Saturday morning, Sunday morning and I think there could have been some come out through Sunday night or Friday night. I forget now.

Q. It was on a day prior to this particular day? A. That is right.

Q. Did you see the truck with the thirty-three cartons on it drive away? A. No, I didn't actually see it drive away. I looked over and the truck had gone when they had taken all the cartons out. 10

Q. After the truck had gone did anything further happen? A. Within ten minutes another man came to the dead house door and said "I have come for the S & S razor blades." I said, "You'd be joking, a fellow just here took them out." He said, "I have got papers." I said, "So did the other fellow have the papers, just the sort like you have got rolled up in your hand." I couldn't tell whether they were papers to clear goods, I couldn't tell you that. They looked like papers that you clear the goods with. 20

Q. Have you recognised within the precincts of the Court the man who came on the second occasion and said he had come to collect the goods? A. I could not be sure. It is five years ago and people look different dressed up to when they are in working clothes. 30

Q. At this time when you were watchman on the dead house at No.2 Glebe Island Wharf you were in fact employed and paid by Port Jackson Stevedoring? A. Yes.

Cross-Examination

CROSS-EXAMINATION:

MR. GLEESON: Q. I just want to identify either by name or by their duties the various people who were in and around the wharf area at the time these razor blades were taken. First of all I think you said there was a man from the Customs Department? A. Yes, Peter Nicholas. 40

Q. He was in the dead house at or about

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Alan Henry Bowdler

Cross-Examination (continued)

the time the goods were loaded on the truck? A. When half of them were loaded.

Q. There were Tally clerks around the place? A. No Tally clerk in the dead house.

Q. There were Tally clerks around the wharf area? A. Sitting out near the door and also Tally clerks near the shed.

Q. There was a delivery clerk? A. There were always company delivery clerks. There were three delivery clerks sitting near the door where the man went to ask would he take the numbers.

Q. There was a head stacker? A. He would be in the shed somehwere.

Q. Those various people, Tally clerks and the delivery clerks and the stacker were like yourself people who were employed by Port Jackson Stevedoring? A. That is right.

Q. And of course the customs officer was employed by the Customs Department? A. Yes.

Q. And the other people were there performing their normal duties - what other people? A. Wharf labourers.

Q. Also employed by the Stevedores? A. Yes.

Q. What other people? A. Other truck drivers in the shed.

Q. They would have been employed by carriers? A. Yes.

Q. What other people? A. Other watchmen in the shed. I had three watchmen in the shed.

Q. The watchmen were all employed by the Stevedores? A. By Port Jackson. One man was outside the dead house and every time I went away he stood outside of the dead house.

Q. That was a watchman? A. That is right. Stuff that may be too big to go in the dead house stays outside the dead house.

Q. The people we have mentioned, they cover the people who were around the area at the time

these goods were taken? A. Yes.

Q. The procedure that was adopted by Port Jackson Stevedoring at that wharf on that day in relation to the delivery of goods to consignees or carriers was their usual procedure was it not? A. That is right.

Q. There was nothing special or unusual about the procedure that was being adopted on that occasion by the Port Jackson Stevedoring? A. Not a thing. 10

Q. It was the same kind of procedure that was used generally by stevedores in the Port of Sydney? A. Yes. (Objected to; question rejected).

Q. You had worked for stevedores for many years? A. That is right, twelve years.

Q. You worked for stevedores beside Port Jackson? A. Yes.

Q. There are in fact only half a dozen or so stevedores who operate in and around Sydney? A. Yes, there are only about four now. 20

Q. There were about half a dozen in May 1970? A. There were eight or nine then.

Q. How many have you worked for? A. The whole lot.

Q. You were familiar with the procedure adopted by stevedores generally in the Port of Sydney? A. Yes. 30

Q. The procedure that was being adopted and carried out by Port Jackson Stevedoring on this occasion was the procedure that was normal for the Port of Sydney? (Objected to; question withdrawn).

Q. There was nothing strange or unusual about the procedure that was being adopted or applied by the stevedores on this occasion in relation to the delivery of goods was there? (Objected to; question rejected). 40

Q. It would be correct to say would it not that on the occasion we are talking about the procedure that was adopted by Port Jackson Stevedoring for the delivery of cargoes

was this, that the consignee or the carrier employed by the consignee goes to the delivery office first of all? A. That is right. No, he comes to the dead house. He will come and ask me or ask the head stacker is the cargo out and he will say they have them in the dead house.

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Alan Henry Bowdler

Cross-Examination (continued)

Q. And having ascertained there were goods in the dead house he would go to the delivery office? A. Yes.

10

Q. He would present his shipping documents to the delivery office? A. Yes, the bill of lading.

Q. And he would then have them examined at the delivery office by the delivery clerk? A. Yes.

Q. And he would then, assuming they were in order, be told to go to the shed and get in touch with the stacker? A. No. He had already seen the stacker if they were out. He goes to the head stacker and asks if they are out and then if his cargo has been located it is then loaded on to the wagon, on to his vehicle.

20

Q. And there is a tally clerk there? A. Yes.

Q. Whose job it is to tally the load on to the waggon and issues a tally ticket? A. That is right.

Q. The ticket is then taken back into the office by the driver? A. That is right.

30

Q. And a gate pass is issued? A. Yes.

Q. He is supposed to present the gate pass at the gate to gain exit from the wharf area? A. That is correct.

Q. That was the procedure that was in operation on this occasion at that wharf? A. Yes.

Q. And that was the procedure that was normal for the Port of Sydney at that time? A. That is right.

40

Q. And it had been normal for the Port of Sydney for many years? A. Yes.

Q. I want to ask you some questions about

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Cross-Examination (continued)

this gate pass. The wharf area is enclosed by a fence? A. I would not say it is enclosed because they have got away with cargo underneath Pyrmont Bridge but they are supposed to go out the road way.

HIS HONOUR: Q. You mean they get it off into the water? A. No, they have even escaped underneath Pyrmont Bridge around the railway line there. (Objected to by Mr. Parker). 10

MR. GLEESON: Q. Is there a gate there? A. There is a check point. It is just the same as the check point at 8 Darling Harbour, 7 Pyrmont.

Q. There is a check point at a gate? A. At Glebe Island there was, yes.

Q. At No.2 Glebe Island? A. Up on top at the road.

Q. Anybody who drove a truck on to No.2 Glebe Island wharf would have to come in through a gate? A. They would have to come in through a gate. 20

Q. And anybody who drove a truck out of Glebe Island No.2 would have to go out through a gate? A. No, ~~they could have gone out of the gate over on the other side near White Bay, which they did, the truck went out~~ - (Struck out by direction)

Q. There is not only the gate you first told us about but there is another gate? A. A gate over near White Bay. 30

Q. It would be possible for a truck to drive out that gate? A. The way he got out -

Q. It would be possible for a truck to drive out that gate from No.2? A. Not unless he had a gate pass.

Q. It would be possible for the truck to drive out that gate? A. He would have to have a gate pass to get out unless he ran over the watchman. 40

Q. Assuming he didn't run over the watchman, whatever gate he got out of the gates you have referred to, he would have to present a document called a gate pass?

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Cross-Examination (continued)

A. That is right. ~~We all knew he went out that gate at White Bay~~. (Struck out by direction).

Q. I want to ask you some questions about the gate pass system. Who issues a gate pass to a person who comes on to the wharf? A. The head clerk.

Q. Is the head clerk employed by the stevedore? A. That is right.

10 Q. In this case Port Jackson Stevedoring? A. Yes.

Q. You said if the man wanted to get out of the gate he would either have to present a gate pass or run over the watchman? A. That is right.

Q. Is the watchman he would have to run over employed by the stevedore? (Objected to by Mr. Sheller and Mr. Parker) A. No. (Objections withdrawn).

20 Q. Who is he employed by? A. By Cargo Control.

Q. Which is an official organisation of the Maritime Services Board? A. It is an organisation trying to stop pillaging.

Q. It is an organisation run by the public authorities of New South Wales? (Objected to; question withdrawn).

Q. He is employed by some organisation called Cargo Control? A. Yes.

30 Q. This is a man whose duty it is to check the credentials of people who drive - A. Not your credentials, just the number of packages you have on your lorry.

Q. And there was such a person at the gate or at one of the gates from which a person could have driven a truck off this wharf on this occasion? A. That is right.

Q. He was a watchman and was employed by Cargo Control? A. Yes.

40 Q. Were there any marks or any other form of identification on this truck on this occasion? A. The only thing I seen about the truck, I could not see its number or anything, it has got

nothing to do with me, I have not got to take numbers or anything coming in or out. I do not take their number.

HIS HONOUR: Q. Was there anything on that truck other than its number? A. It was a white truck, covered-in white truck.

MR. GLEESON: Q. Did it happen to have on the side the name of the person who owned it? A. I cannot say. It was only the tail of it. I could only see the tail of the truck from the dead house. I did not get down and have a look and see. 10

Q. Did it have number plates? A. Yes, which I was told after by the Pillage Squad -

Q. Did it have number plates? A. Yes, but I didn't see them.

HIS HONOUR: Q. When you say it was a white truck you mean white in colour? A. White in colour, a covered-in white truck.

MR. GLEESON: Q. The dead house of which you speak, that is an enclosed area of the wharf? A. Yes. 20

Q. The reason goods of the kind that you mentioned to his Honour are put in the dead house is to give them protection from being stolen? A. For security.

Q. All of the cartons of razor blades in question in this case after discharge from the vessel had been put into this enclosed area called the dead house, for security? A. Yes. 30

Q. The delivery clerk who dealt with the person who took the cartons of razor blades away on this occasion was Mr. Glover? A. But did he deal with him. I went in and spoke to Mr. Glover and Mr. Glover said that he had not been in there.

Q. The delivery clerk who was on duty at this time - A. Was Mr. Glover.

Q. And he was employed by Port Jackson Stevedoring? A. That is right. 40

MR. PARKER: Q. You have described yourself as an employee of Port Jackson. You are a casual? A. A casual employee, yes. I work

for anybody who picks me up.

Q. I think you started as a watchman about 1963 did you not? A. Round about.

Q. The delivery clerk who is referred to, Mr. Glover, has an assistant delivery clerk does he not? A. Yes. I cannot think now who the assistant was.

Q. But the usual practice was to have an assistant? A. He has an assistant, that is right.

Q. You were required were sic not to be in the dead house? A. In the dead house and looking over the shed.

Q. And not to leave it unless it was attended? A. That is right.

Q. And in your absence it would be attended on that day by a person called Moore? A. Mr. Moore, yes.

Q. Mr. Moore at the time of the events that have been discussed was actually somewhere outside, was he not? A. Outside of the dead house.

Q. As far as you remember he also spoke did he not to the person who presented himself first with the documents? A. That is right.

Q. The Tally clerks who you observed sitting in the dock, how far were they away from you when you observed them? A. About from here to the wall and a little bit further back. I would say the length of this room. It may be a little bit further.

Q. They were clearly outside of your hearing? A. Yes.

Q. Do you think it would be over fifty feet? A. I don't know.

Q. Between fifty and 100 feet? A. It would be over fifty feet.

Q. There was a storeman in the dead house at that time? A. He was not until they were taking the razor blades out.

Q. What was his name? A. Arthur Murphy. He is deceased now.

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Plaintiff's evidence

Alan Henry Bowdler

Cross-Examination (continued)

Q. There is a method by which you personally allocate the cartons over the cargo space in the dead house? A. Yes, I write down A, B, C, D and so on, around the wall. I might have markings like S & S, K & G, Nock & Kirbys. I put them up and somebody would say "Have you got Nock & Kirby's out?". I would look at my sheet and say, "Yes, there are four or five over there" and indicate the cartons underneath O. 10

Q. You spoke about Cargo Control as employing the gate men? A. Only on the check points.

Q. Do you also know an organisation called Osra? A. That is them.

Q. That organisation Osra is Cargo Control? A. That is correct.

Q. It was not possible for you to see into the delivery office from your point in the dead house? A. No, no chance in the world unless I broke the boards down alongside it. 20

Q. You didn't see the man who first presented the papers to you going back to the delivery office, did you? A. I cannot say. I seen him walk out of the door and turn to his left.

Q. He could easily have gone to the delivery office so far as you were concerned? A. That is what I thought he did, he went to the delivery office. 30

Q. And if he had gone to the delivery office he could have got a gate pass? A. He would not have got a gate pass.

Q. If the matter had been proceeding as you thought it was perfectly regularly he would have gone to the delivery office and got a gate pass? A. No. He would have to get a gate pass off the Tally clerk before he could take it into the delivery office and then he gets a gate pass. 40

Q. Having done that he would get a gate pass? A. Yes.

Q. Do you remember the names of the Tally clerks who you saw sitting down to whom you

directed this man? A. No.

Q. You do know them do you as Tally clerks? A. I knew them by sight. I didn't make contact with them too much. They were casuals.

Q. They were tally-on clerks? A. Yes, delivery clerks.

Q. The person who took the goods on to the trolley didn't take all of them did he, he didn't take the cartons that had been pillaged? A. No. He also did not take one that was - it was a carton, just small cartons to put the razor blades in and the custom fellow pulled one out and said, "They have not been touched, what are you going to do, take them or leave them?". He said, "I'll leave them here with the pillaged stuff." They were no good because they were all empty cartons.

Q. Does it now strike you as strange that the person bearing the true documents should arrive shortly after the other person? (Objected to by Mr. Sheller) A. He arrived about ten minutes after. (Question rejected).

Q. Could you describe to the best of your recollection this man who presented the documents? A. which one?

Q. The first one? A. He would be nearly as tall as you, might be a little taller, and very thin.

Q. About what sort of age would he have been? A. About 28.

Q. You said some words to the person who came with the true documents? A. Yes. I said to him, "You would be joking. They've just gone."

Q. Did you use any other words? A. No, but I did to the first fellow.

Q. When you suggested to this person that he go and find the tally clerk you could see the tally clerks to whom you were directing him? A. Yes.

Q. That was in your experience a normal practice? A. Yes, that's right, and for them to go to the dead house then.

Q. Before he tallied on? A. Yes, but some they come and some they won't.

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Plaintiff's evidence

Alan Henry Bowdler

Cross-Examination (continued)

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Plaintiff's evidence

Alan Henry Bowdler

Cross-Examination (continued)

Q. In any account, in suggesting to him that he go over to the three tally clerks for tallying on, you were following a normal practice? A. Yes. I also asked him -

Q. Please. The dead house itself had only one entrance? A. Yes.

Q. That was the entrance to which you had the key? A. Yes.

Q. There is a distinction in wharf practice between a delivery clerk and a tally-on clerk? The tally-on clerks do different duties to the delivery clerks, don't they? A. There is hutch clerks that tally stuff out from the ship and there is the delivery clerks. They are two different - they have delivery clerks tallying from the ship. 10

Q. And there are tally-on clerks as well? A. No, they are the delivery clerks.

Q. You recall a person called Wileman? A. That was the chap on the back gate. He is deceased too. 20

Q. He was the gatekeeper at the back gate, which is the Robert Street gate? A. Yes.

Q. Would you look at the plan I show you and identify the - A. I know it pretty well because I have worked on the gate pretty well myself.

Q. You will see the two letters X and Y? A. Yes. 30

Q. Will you agree with me that the point marked X is what might be termed the main gate? A. Yes, that is right.

Q. And the point marked Y is the gate where Mr. Wileman was? A. Yes.

(Plan marked for identification A.)

MR. SHELLER: No re-examination.

(The witness left the Court room)

HIS HONOUR: Mr. Gleeson, his evidence I take it is relevant apart from anything else from your point of view to your cross claim against Mr. Parker? 40

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Plaintiff's evidence

Alan Henry Bowdler

Cross-Examination (continued)

MR. GLEESON: Yes.

HIS HONOUR: Are you eventually going to say that amongst other things it was negligent of him as the stevedore's employee not to have looked at the documents?

MR. GLEESON: Yes.

HIS HONOUR: Do you think you should not put that to him in cross-examination?

MR. GLEESON : If your Honour pleases I will.

10 HIS HONOUR: I do not think it would be right to make the suggestion without giving him the opportunity.

MR. SHELLER: If such a question were put I am concerned at my own position.

HIS HONOUR: I would have thought you might have wanted to put that too but couldn't put it because you led the witness.

MR. SHELLER: I am sorry.

(Witness returned to the witness box)

20 MR. GLEESON: Q. You mentioned to his Honour that when the man who took the razor blades away came to see you he had some documents in his hand? A. Yes.

Q. Were they documents that you thought had something to do with the cargo that he was going to take away? A. I can't ask the man to show me his papers. That is for the delivery man or clerk. He could tell me that has got nothing to do with me. That is clerk's work. 30

Q. Did he have those papers or documents in his hand as though they had something to do with the cargo that he was coming to collect? A. They looked like documents to collect cargo.

Q. In the normal course could a person who came to collect a cargo have documents of that description? A. Yes, but I couldn't see on them what they were.

Q. But you thought they were shipping documents?
40 A. That's what I thought.

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Plaintiff's evidence

Alan Henry Bowdler

Cross-Examination (continued)

Q. And you thought they were documents which would in some way demonstrate that he was a person entitled to collect the cargo? A. Release the cargo.

Q. Did you ask him whether you could have a look at the documents? A. No, I couldn't ask him to have a look at the documents.

Q. Why not? A. Because it's got nothing to do with me. I'm only there in charge of the dead house. 10

HIS HONOUR: Q. What I am puzzled about is this: you are there in charge of the dead house and it is a place which provides or is intended to provide greater security than another part of the wharf shed. Why is it that you do not check the goods out to see that the person who is taking them is authorised to take them? A. A clerk comes to get them. That's not my job. That's a clerk's job. 20

Q. The clerk does not come in to the dead house? A. Yes, my word.

Q. Where does he come from? A. From out of the shed or from the delivery office.

Q. And he comes to the dead house with a carton? A. Yes, to write him out a docket to take the cargo.

Q. Why could not a carrier come to you, not show you any documents and say "I have been to the delivery office, the documents are in order, I'm taking these cartons of razor blades now."? A. That's right. That's what he said. 30

Q. How do you know he has got authority to take them? A. The tally clerk. He naturally went to the tally clerk and when I seen the tally clerk nod his head I naturally thought he was going to take numbers over there, which I asked him again. I said, "What about your tally clerk coming in here?" He said, "He's all right. He's checking the numbers over there sitting in the sun." I can't get a tally clerk by the hand and bring him. 40

Q. At the time these goods are taken does not anybody in the dead house look at some document which he has to satisfy themselves

that in fact he has authority to take them?
A. No.

Q. Why not? A. Never yet.

Q. But why not? A. I don't know. It's just the rule with every company.

MR. GLEESON: Q. Is this what you are saying - correct me if I am wrong, do not agree just because I am suggesting it: are you saying it was Mr. Murphy's job to look at the documents?
10 A. No. (Question objected to and allowed).

Q. Whose job was it, Mr. Murphy's job? A. Nobody looks at them. You can go to any dead house at all and they will come and ask you, is there cargo in there and they will say yes - I would say "Yes, go into the delivery office and get your papers fixed up." And you go and get them.

Q. The man at the delivery office is supposed to look at them? A. He looks at his papers.
20 It's got nothing to do with me. I'm just a watchman.

Q. Is the tally clerk supposed to look at them? A. Yes. He is supposed to write his docket out for him and give it for him to take and get a gate pass after he is loaded.

Q. That clerk's docket that is supposed to be written out is something he is not supposed to write out before he satisfies himself by looking at the shipping document that the
30 man is entitled to the goods. A. Yes.

Q. Do you say it was the job of some tally clerk to look at the shipping documents before he wrote out a docket? A. He does not always look at it.

Q. But it is his job? A. Yes, but he don't always look at it. He will just say - (Objected to.)

Q. Can you tell us the name of the tally clerk whose job it was on this occasion to
40 look at these documents? A. Any tally clerk.

Q. I think you mentioned a Mr. Murphy earlier? A. I didn't mention Mr. Murphy as a tally clerk. I said if Mr. Murphy was in the dead house - he was a storeman and is deceased.

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Plaintiff's evidence

Alan Henry Bowdler

Cross-Examination (continued)

Q. Who is the tally clerk who was sitting in the sun? A. I wouldn't know his name. He was a casual the same as me and you don't -

Q. In the normal course would that tally clerk get up out of the sun and come across into the dead house? A. They're supposed to but they don't.

Q. But that is what their job is? A. It's their job but they don't. I can't go and get him by the hand and force him. 10

Q. What you say in relation to this is that it was not part of your job to look at the shipping documents; that should have been done by some tally clerk? A. Yes.

Q. The tally clerk should have got up off his seat and come over out of the sun into the dead house? A. Yes.

Q. Nevertheless, you saw that the tally clerk on this occasion did not get up out of the sun and come across to the dead house? A. Yes. He was checking numbers. He said, "The chap told me he was going to check numbers of the cartons." Which they often do. 20

Q. There is nothing whatever to stop you asking the man to show you the shipping documents? A. It has got nothing to do with me. Nothing whatsoever. I am just the watchman.

HIS HONOUR: Q. That is what puzzles me. Please understand I am not criticising you, I just want to find out. If you are the watchman naturally you watch to see that the goods are not being interfered with by persons not authorised to interfere with them? A. Yes. 30

Q. How do you know if the person is authorised or not if you do not look at documents? A. When the tally comes.

Q. If you see the tally clerk give him the all clear that is good enough for you? A. Yes. Then they have got to get out the goods. 40

Q. If you do not see the tally clerk do his job why do not you as a watchman do it instead? A. No, I can't do it. That's the tally clerk's job.

Q. There is union trouble if you do? A. Yes.

Q. It is a question of you doing his work? A. That's right.

Q. And this becomes a demarcation dispute? A. Yes, I get cited.

Q. Cited by the union? A. Yes.

MR. PARKER: Q. Just speaking generally, it is the duty of the tally-on clerk to prepare the tally-on ticket? A. Yes.

10 Q. After checking the goods which are presented to him as they are packed on a particular wagon? A. Yes.

Q. After that has taken place the consignee or his carrier returns with a tally-on ticket to the delivery office? A. Yes, that's right.

Q. And there he presents his - A. Tallies ticket.

Q. He therepresents his tally-on ticket
20 to the delivery clerk? A. Yes.

Q. And if those documents are in order, that is to say if the delivery clerk checks the tally-on ticket with the shipping documents, the consignee or his carrier is given a gate pass and armed with that gate pass consignee or his carrier leaves the wharf and goes through the gate which is manned by people in the manner you have described? A. Not all gate keepers, though.

30 Q. The two ways of leaving Glebe Island Wharf in those days were to go through the main gate which you have marked as X or the Robert Street gate which is marked on that plan as Y? A. Yes.

Q. You said to questions that his Honour and counsel have asked you that the tally-on clerk was, with respect to the goods in the dead house, expected to come over to you in the dead room? A. Yes.

40 Q. Did I understand you to say if you were satisfied yourself - did you mean that if you were satisfied in fact that the tally-on clerk would do his duty outside the dead house

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Plaintiff's evidence

Alan Henry Bowdler

Cross-Examination (continued)

you would permit the consignee or his carrier to go over to the tally-on clerk? A. Yes.

Q. And that happened on occasions other than the occasion in question? A. Many occasions.

Q. And in the events which had happened there was no suggestion in your mind either given by the chap with the documents in his hand or the tally-on clerks that the tally-on would not take place outside the dead house in a proper way? A. That's right. Can I say something? 10

HIS HONOUR: No.

MR. PARKER: Q. Can you describe what the tally-on clerk should do in checking the cartons in this case with the - he has got a ticket? A. He has got his bill of lading. He takes it over to the tally clerk, shows it to the tally clerk - 20

Q. And the tally-on clerk prepares the tally-on ticket? A. Yes, he don't always have to show his document.

Q. He does not always have to show his document? A. No.

Q. But he can do so on occasions? A. Yes.

Q. The duty of the tally-on clerk is to prepare the tally-on ticket? A. Yes.

Q. Which sets out the goods which are being delivered to the consignee or his carrier? 30 A. He'll always say, "Whose the consignee?".

Q. But it is that which we describe as the tally-on ticket which the consignee or his carrier takes back to the delivery office? A. Yes.

Q. And on occasions the delivery clerk may have the shipping documents there. The consignee or his carrier need not carry over the shipping documents to the tally-on clerk? A. I don't understand. 40

Q. You have said that sometimes the consignee or the carrier does not carry over the bill of lading? A. They generally go over and say, "How many have you got?" and so and so.

Q. Quite often they are not taken over to the tally-on clerks? A. Yes. Sometimes they are not.

HIS HONOUR: Q. Simply on the basis of what you observed that day and on nothing else, did the tally clerk carry out his duties as you understand them or not? A. He should have been in the dead house and he sat down near the door.

10 Q. Is the answer No? A. Well, it goes on all the time. I would say it was quite all right. I've even let cases of guns and pistols go out the same way. The tally clerk - sometimes you will ask a tally clerk to come up and they've been short and have been doing three jobs. (Mr.Parker objected.)

MR. PARKER: Q. There was nothing in the demeanour of the person who presented
20 these documents or from the tally-on clerks to suggest to you there was anything wrong? A. There didn't see anything wrong.

Q. And you trusted the tally-on clerks to do their duty? A. Yes.

(Witness excused subject to recall)

WILLIAM GEORGE CAMPBELL
Sworn and examined:

MR. SHELLER: Q. Is your full name William
30 George Campbell? A. Yes.

Q. Do you live at Lot 1, Wynyard Avenue, Rossmore? A. Yes.

Q. Would it be correct to describe you as retired? A. Yes.

Q. In May 1970 you were a director of a company called W.Campbell Pty. Ltd.? A. Yes.

Q. Which carried on the business of carriers? A. Yes, that is correct.

Q. And I think you had been in that
40 business most of your life and indeed your grandfather and father had been engaged in the business before you? A. Yes.

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Plaintiff's evidence

William George Campbell

Examination (continued)

Q. You took over this particular business in 1942 when your father died? A. Yes.

Q. During all your working life you have been engaged in transporting and arranging the transport of goods to and from wharves in Sydney? A. Yes.

Q. Do you recall in May 1970 speaking to Mr. Doonan of P.J.Pemble & Sons about a consignment of razor blades? A. Yes. 10

Q. Following upon that conversation did you receive a document from Pemble's Office? A. Yes.

Q. Would you look at Ex.A. Do you recall that document? A. Yes, bill of lading.

Q. In respect of a consignment of 37 cartons of razor blades? A. Correct.

Q. Having received that document what did you do? A. At that particular time I received the document just before the lunch hour and our two outside men were away and they usually treat these as a matter of urgency. When I had some lunch I decided to go to the wharf myself to see if they were available and out of the ship. 20

Q. Did you go to the wharf? A. Yes.

Q. That was No.2 wharf Glebe Island? A. Yes.

Q. Do you remember approximately what time it was you went to the wharf? A. It would be approximately I would say around 1.30. 30

Q. When you got to No.2 wharf Glebe Island what did you do? A. I went to the delivery office and presented the bill.

Q. To whom did you present it? A. The delivery clerk. I assume it was the delivery clerk. There can be up to three men in the office.

Q. This was the delivery office at No.2 wharf shed? A. Yes. 40

Q. You handed him that document Ex.A. Did you have any conversation with him? A. I asked him where the goods were, did

he know if they were available, where they were.

Q. What did he say? A. He said "In the dead house".

Q. What did you do then? A. I went around to the dead house. I looked around outside. Sometimes they put these goods outside the dead house. I couldn't see them and then the dead house keeper approached me and asked me what I was looking for. I told him -

Q. What did you say? A. I said, "I'm looking for a case of razor blades.".

Q. A case of razor blades? A. I called them cases.

Q. Cases of razor blades? A. Yes. I believe these were in cartons but I asked for cases. I was used to carting them in cases for another client.

Q. Did you describe the markings on the cases? A. No, I didn't, not at that stage.

Q. When you asked for them what was said to you? A. It was then I think that - I'm not positive but I think then he asked me what the marking was. Then I told him the marks and he said, "You're about ten minutes too late. They've gone. They've just left the wharf. If you had been here ten minutes earlier you would have caught them loading" you know what I mean.

Q. Was the marking you referred to the marking "S. & S." that appears on that bill of lading? A. The mark I referred to, yes.

Q. After the dead house keeper said that to you what happened then? A. I immediately returned to the delivery office. I spoke to the gentleman in the delivery office. I said, "These goods have been delivered. I said, "It looks as though they have gone to the wrong carrier." I had a fair idea in my own mind what had happened.

Q. Don't worry about that. Did he say anything to you? A. No. He just looked astounded and he made to go in the direction I would say to the wharf. I went out the other way, got in my car and went straight

back to get in touch with P.J.Pemble.

Q. He appeared to go into the wharf shed?
A. He appeared to go into the wharf shed.

Q. Did you take any cartons of razor blades from the wharf on that occasion?
A. No, not at any time.

Q. Just to make it clear, you had in fact gone out simply to present the bill of lading and enquire? A. Yes.

Q. You had not taken a truck to pick the razor blades up? A. No. 10

Q. Did you leave the bill of lading there?
A. Yes, with the delivery clerk.

Q. Do you recall that this took place, this occasion you have described, on 14th May 1970? A. I could not recollect the correct date, no.

Cross-Examination

CROSS-EXAMINATION:

MR. PARKER: Q. Mr. Campbell, did you advise anyone in your firm you proposed to go down 20 to the wharf and make this enquiry before you did that? A. Well, my brother who is deceased.

Q. What position did he hold in the company? A. He was a director.

Q. Was any investigation subsequently made by you or your firm as to what had happened?
A. No.

Q. You simply reported it to P.J.Pemble?
A. Correct. 30

Q. I suppose you would agree it was very surprising that the person had actually taken the cartons only ten minutes before you arrived? (Objected to by Mr.Sheller and allowed as admissible for the time being against Mr.Gleeson).

Q. (The last question was read by the Court Reporter) A. Yes, now.

Q. Could you offer any explanation as to that coincidence? (Objected to by Mr.Sheller 40 and allowed as against Mr.Gleeson) A. Any explanation, no.

MR. SHELLER: No re-examination

(Witness retired and excused)

MR. SHELLER: That is the case for the plaintiff.

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Plaintiff's evidence

William George Campbell

Cross-Examination (continued)

CASE FOR THE FIRST DEFENDANT:

HERBERT DEAN
Sworn and examined:

First-named Defendant's evidence

Herbert Dean

Examination

MR. GLEESON: Q. What is your full name? A. Herbert Dean.

10 Q. You live at 22 Mona Value Road, Pymble? A. Yes.

Q. I think as at May of 1970 you were a director of amongst others three companies, namely Blue Star Line Australia Pty.Ltd.? A. Yes.

Q. Joint Cargo Services Pty.Ltd.? A. Yes.

Q. And Port Jackson Stevedoring Company Limited? A. Yes.

Q. Blue Star Line Australia Pty.Ltd. was 20 a company that had been incorporated in New South Wales in 1934? A. Yes, that is correct.

Q. And it was an Australian subsidiary of a London company? A. Yes.

Q. Joint Cargo Services Pty.Ltd. was a

company that was incorporated in the Australian Capital Territory in October 1967? A. Yes.

Q. And the shareholders in Joint Cargo Services Pty.Ltd. were the Blue Star Line Australia Pty.Ltd. as to 42% of the issued shares? A. Yes.

Q. Port Line Limited of London as to 40% of the issued shares? A. Yes.

MR. SHELLER: I seek to have an objection noted on this. I appreciate something was said about this sort of evidence in the Marinda case. 10

HIS HONOUR: Perhaps the evidence can be admitted subject to relevance and it may be argued later.

MR. GLEESON: Q. And as to 18% of the issued capital by Ellen and Buckner (?) Steamship Company of London? A. Yes.

Q. I think the position was that Port Jackson Stevedoring Company Limited was a company that had been incorporated in New South Wales and it was a company in which Blue Star Line Australia Pty.Ltd. owned 49% of the share capital? A. Yes. 20

Q. And Cunard International Australia Pty. Ltd. owned 51% of the share capital? A.Yes.

Q. I show you Ex.A. I think you see that there is a reference on Ex.A to a company, Blue Star Line Limited? A. Yes, that is correct. 30

Q. That was a London based company? A.Yes.

Q. And Blue Star Line Limited of London and Blue Star Line Australia Pty.Ltd. were members of the same group of companies for the same ultimate beneficial ownership? A. In the United Kingdom.

Q. As at May 1970 Joint Cargo Services Pty. Ltd. carried on in the Port of Sydney the business of ships' agent? A. Yes, that is correct. 40

Q. That was its business? A. Yes. I think the position is, is it not, Mr. Dean, that

it is normal for ships owners to have and be represented by ships agents in various ports? A. Yes.

Q. And Joint Cargo Services Pty.Ltd. in May 1970 was the agent of the Blue Star Line in the Port of Sydney? A. Yes, that is correct.

Q. I think the company Blue Star Line Australia Pty.Ltd. was in the nature of a holding company; it did not iself carry on any business? A. That is so.

Q. The business of a ships agent is to represent the ship owner in the port? A. Correct.

Q. And to arrange for the doing of such things as are necessary to be done for the purpose of the ship owner's obligations in the port? A. Yes.

Q. They include amongst other things of course statutory obligations such as making arrangements - in the Port of Sydney - with the Maritime Services Board, the customs people and the like? A. Yes.

Q. You are aware I think that as at May 1970 Port Jackson Stevedoring Pty.Ltd. usualy did the stevedoring work in respect of Blue Star Line vessels that arrived in the Port of Sydney? A. They did all the work.

Q. Was that pursuant to an arrangement between Blue Star Line and the Port Jackson Stevedoring Company or pursuant to a contract between Joint Cargo Services and Port Jackson Stevedoring Company? A. A contract with Blue Star Line Australia Ltd.

Q. That is the contract of Port Jackson Stevedoring? A. To do the stevedoring.

Q. Was with Blue Star Line? A. Yes.

Q. Blue Star Line Australia Pty.Ltd.? A. Yes, as agent for Blue Star Line Limited London.

Q. You were a director of all those three companies? A. Yes.

Q. I think the system was in May 1970 that when a Blue Star Line vessel was due to arrive in the Port of Sydney, Joint Cargo Services

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Herbert Dean

Examination (continued)

would simply notify Port Jackson Stevedoring Pty.Limited of that fact?
A. Yes.

Q. And the function of the stevedoring company in relation to a Blue Star Line vessel included unloading cargo from the vessel and storing the cargo and ultimately delivering the cargo to the consignee or his representative? A. Yes, that is correct.

Q. And it is the position, is it not, that none of the persons who took part in the unloading of the cargo or storage of the cargo or delivery of the cargo to the consignee or his representative in May 1970 were employees of Joint Cargo Services Pty.Ltd.? A. The only man we employ of Joint Cargo Services would be the delivery clerk in the office, city office, who placed that stamp "Joint Cargo Services" on the bill of lading.

Q. Apart from the man in the city office of Joint Cargo Services who placed the stamp on the bill of lading, the people who attended to the unloading and storage and delivery of the cargo were employees of Port Jackson Stevedoring? A. Yes.

Q. The man in the city office of Joint Cargo Services who placed that stamp on the bill of lading would not normally go to the wharf at all? A. He might go and look at the cargo.

Q. I said normally? A. Normally, no.

MR. GLEESON: As a ship's agent for the Blue Star Line, it would be part of the duties of Joint Cargo Services Pty.Limited to note, to attend to the payment of such charges as they were due from the ship owner to persons who performed services for the ship owner in the port of Sydney?
A. Yes.

Q. And in that connection it was normal, was it not, for Port Jackson Stevedoring to submit an account for its stevedoring services to Joint Cargo Services, which would pay that account out of funds which were either then or subsequently made available to it by the Blue Star Line? A. That is correct.

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Herbert Dean

Examination (continued)

Q. I want to show you a document. By the way, I think in the normal course of its business as a ship agent, Joint Cargo Services would keep a voyage account in relation to any particular vessel? A. That is correct.

Q. And it would account to the ship owner in due course for the freight that it received in relation to that vessel and for the charges that it incurred in relation to that vessel? A. That is correct.

Q. Now I show you a document. Do you identify this as the document that was received from stevedores in relation to the vessel, New York Star, in relation to the trip the subject of these proceedings, the voyage the subject of these proceedings? A. It is the stevedoring account from the Port Jackson Stevedoring Company. It is on the New York Star. I have not seen it before. It is, I presume, the correct account.

(Above mentioned document sought to be tendered)

Q. That account was physically sent by Port Jackson Stevedoring to Joint Cargo Services, is that the position? A. Yes.

Q. And in the normal course it was paid by Joint Cargo Services Pty. Limited? A. Yes.

Q. Out of funds of the Blue Star Line that were held by Joint Cargo Services? A. That is correct.

Q. Perhaps I can also ask you this -

MR. SHELLER: Might I just have a chance to look at this? I can't conceive there will be any objection to it, but it has not been produced before.

MR. GLEESON: If it be relevant, I understand that last remark of my learned friend, according to my instructions, is incorrect.

HIS HONOUR: You mean his remark is as correct as it is relevant?

MR. GLEESON: His remark is as correct as it is relevant.

MR. SHELLER: I have no objection and I withdraw what I said before. (No objection by Mr.Parker).

(Above document, described as a Discharging Account Statement issued by the Port Jackson Stevedoring Pty. Limited, of the 19th June, 1970 admitted as Exhibit 1).

HIS HONOUR: What is the relevance of this? Is it that it assists you in attempting to import the conditions of the Bill of Lading into your own position?

MR. GLEESON: Yes, your Honour; and, additionally, it will ultimately become a question for your Honour, what part Joint Cargo Services actually played in this whole transaction; and it is part of the evidence relevant to the relationship between Joint Cargo Services and the stevedores -- not necessarily a very helpful part of the evidence in that regard -- but it is a necessary part. 10

HIS HONOUR: I had better read the Privy Council case again, I read it when it came out a year ago. 20

MR. GLEESON: I think the significance of that document is not great.

HIS HONOUR: Have you the reference to the Privy Council decision? I had a copy of it.

MR. GLEESON: I know it is in (1974) 1 All E.R. -- probably in the W.L.R.

HIS HONOUR: It is not in the W.L.R. is it? I have a reference to it in the L.R. 30

MR. SHELLER: The reference in the L.R. is 1974 --

HIS HONOUR: I can find it.

MR. GLEESON: Q. Another part of the functions normally performed by Joint Cargo Services, and in fact performed in the present case is to notify the Maritime Services Board of the impending arrival of a Blue Star Line vessel and arrange for a wharf to be made available to it? A. That is correct. 40

Q. I think the procedure of the Maritime Services Board is actually attended to by the Marine Superintendent who in relation to this matter was a gentleman named Captain Harris? A. That is so.

Q. He is available for his Honour and is in a better position to tell his Honour about what goes on in relation to Joint Cargo Services and the Maritime Services Board? A. That is correct.

Q. There is prepared a document which records charges due for berthing to the Maritime Services Board? A. Yes.

Q. And those charges are met and paid by Joint Cargo Services out of funds of the Blue Star Line? A. That is correct.

Q. Will you look at that document. Is that the document relating to the Joint Cargo Services and paid to the Maritime Services Board in the present case (shown) A. That is correct.

(Above mentioned document tendered without objection and marked Exhibit 2).

Q. Mr. Dean, just to take the matter a little further as to the rule of Joint Cargo Services, as it operated in May 1970, I think the usual procedure was that when the goods were transported by sea from overseas to Australia there would be a Bill of Lading made out by the shipowner overseas? A. By the shipper and lodged.

Q. By the shipper and lodged; the Bill of Lading would find its way into the hands of the shipper or perhaps consignee, or perhaps banks or people standing in the place of the consignee in this country? A. Yes.

Q. And then when the ship arrived I think one of the functions of the shipowner was to send notice to a commercial newspaper saying that a ship had arrived and saying where it would berth? A. Yes, that would be the ship's agent.

Q. The ship's agent? -- sorry, I meant Joint Cargo Services would do that? A. Yes.

Q. If for example one of the Blue Star vessels were due to arrive in the port of Sydney in a few days' time, Joint Cargo Services would cause that matter to receive publicity in the commercial press? A. Yes.

Q. And presumably pursuant to that publicity

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Examination (continued)

or by other means the consignee or those representing the consignee in the port of Sydney, the consignee would know that cargo was due to arrive here? A. Yes.

Q. I don't think Joint Cargo Services would take any steps to notify the normal consignee in the particular case apart from giving it publicity in the press? A.No.

Q. And then in due course, in order to put itself in a position to take delivery of the cargo, the consignee would pay the Bill of Lading to various people to have stamps put on it? A. That is correct. 10

Q. For example, there would be a stamp put on it to indicate that customs charges had been paid? A. He would have to put through a customs entry, yes.

Q. There would be a stamp put on the Bill of Lading by the Martime Services Board? A. That would be for it -- 20

Q. But that would also be the stamp put on the Bill of Lading by Joint Cargo Services? A. As on Exhibit A.

Q. As on Exhibit A. And that stamp amongst other things would record that freight had been paid and that various port charges had been met? A. That is correct.

Q. And the stamping of the Bill of Lading in that way in the normal case was the extent of the personal sontact between any employee of Joint Cargo Services and the cargo? A. Yes. 30

Q. Now again, thinking of the normal case, and leaving to one side exceptional cases, when goods were imported into Australia in that way, apart from the ship's agents and the stevedores, and apart, of course, from any representative of the public authority like the Customs, would there be other agents or independent contractors who would be likely to have any contact with the goods between the time they were discharged and the time they were taken delivery of by the consignee? A. From the ship? 40

Q. Yes. A. Not that I am aware of.

Q. Not just from the ship, but from the

shed? A. Not that I know of.

Q. So that apart from the ship's agents and stevedores in the normal case, there would not be any other people who would have contact with the goods until they were delivered to either the consignee or the consignee's representative? A. That is correct.

10 Q. The Bill of Lading in this case, Exhibit A, was of standard form of document, a standard form of document in use at that time? A. That is correct.

Q. It was the standard form of lading that was in use by the Blue Star Line? A. Yes. It is headed "Blue Star Line".

Q. It was their standard form of document? A. Yes.

20 Q. That was well-known to Joint Cargo Services? A. Yes.

Q. Port Jackson Stevedoring? A. Yes.

Q. I think the position is this, is it not; that it was common knowledge in shipping circles, at least, and amongst people engaged in the shipping business, which would include Joint Cargo Services and Port Jackson Stevedoring, that that common form of Bill of Lading contained clauses relating to exemption or exclusion of liability? A. That
30 is correct.

Q. And it was common knowledge amongst other things (and leave aside their degree of success in this kind of thing) that those clauses were devised to confer exceptions and exclusions not only on the shipowner itself, but also on its agents? A. I can't say for myself, but I think --

Q. But that was generally approved of? A. Yes.

40 Q. By people like Joint Cargo Services and the ship owners? A. Yes.

CROSS-EXAMINATION

MR. PARKER: Q. Mr.Dean, do you recall who was the marine superintendent in Joint Charge at this time in May 1970? A. Captain Harris.

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Cross-Examination (continued)

Q. And I take it, in making any arrangements with the stevedore there would be occasions of necessity for the marine superintendent to go to the wharf? A. He would go down once a day at least.

Q. And the purpose for that, I suppose, sir, would be, would it not, to check that everything was in order for the purpose of the ship coming alongside? A. On the day of arrival, yes. 10

Q. And I suppose as far as Joint Cargo would be concerned, he would be the man who would voice any comment or criticism about the arrangements that were to be made? A. Yes.

Q. He would be, I suppose, from trading practice, familiar with the practice and procedures generally that would apply on the wharf? A. Yes.

Q. Can I ask you please, Mr. Dean, if this can be shown to you? The document now marked Exhibit 1 which is the Port Jackson Pty. Limited's Discharging Account Statement (shown). You have said, have you not, that this would be an account that was sent; you identified it as a document that was sent by the Port Jackson Pty. Limited to the first-named Defendant? A. Yes. 20

Q. Do you remember whether it had any supporting documents with it? A. I cannot answer that because it did not go through my hands at that -- 30

HIS HONOUR: Q. I don't think you saw it at the time? A. No. I did not.

MR. PARKER: Q. Can I ask you this? I only ask it to inquire from you whether that deals with storing and stacking accounts that might have been sent. A. Storing and stacking if I remember correctly at that time was collected by Joint Cargo themselves within their office. 40

Q. And sent to Port Jackson? A. Yes.

Q. Would you have a look please at the document I show you and identify it as a storing and stacking reconciliation. Could

you confirm that it relates to the New York Star? A. (Shown). That is this document?

Q. Yes. A. That is headed "New York Star".

Q. That document is a document that does appear to be a document from your company? A. Storing and stacking reconciliation, 24th June. Yes, it would be from Joint Cargo.

Q. To the second-named defendant? A. Yes.

Q. To Port Jackson? A. Yes.

10 (Above mentioned document m.f.i. B)

WITNESS: On looking at that again in relationship with the Bill, I am not certain whether the statement was made out by Joint Cargo or Port Jackson. But it does relate to the --

MR. PARKER: Q. It is likely to have been sent by Port Jackson. A. The figures of the actual cargo discharged, the actual manager's figures, yes.

20 Q. Do you know whether any special arrangements were made by Captain Harris for the ship New York Star, for its discharge? A. I am not quite sure of this word "special". What happens, he would do, would be to speak to the Port Jackson Stevedoring stevedores, tell them how much cargo we have in each batch, how many gangs and the size of the shed and the labour available.

Q. And that would be a matter for him? A.
30 And the size of the stevedores, yes.

MR. SHELLER: Q. Mr. Dean, Blue Star Line and Blue Star (Australia) -- Mr. Dean, in May 1970, is it correct to say that the shareholders of the English company, Blue Star Line Limited, were Frederick Leyland and Company Limited and Robert Barrow Limited? A. I am afraid I can't answer your question other than to say that the two companies mentioned are part of the group. Whether they are
40 the shareholders of the Blue Star referred to, I would not know.

Q. Have you any idea of who the shareholders of Blue Star Line were -- A. No.

Q. -- in May 1970. A. The answer is No.

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Cross-Examination (continued)

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Herbert Dean

Cross-Examination (continued)

Q. Or even at to-days date? A. No.

HIS HONOUR: Q. You are a director of the Australian company? A. Yes.

Q. The subsidiary? A. Yes.

Q. MR. SHELLER: Mr. Dean, Blue Star Line (Australia) Pty. Limited has an issued capital of 20,000 $2 shares. Is that correct? A. That is correct, yes.

Q. And had such an issued capital in May 1970? A. That is correct. 10

Q. That of issued capital, 19,993 were held by a company called Finance Company Limited? A. New Holding Finance Company Limited.

Q. New Holding Finance Company Limited? A. Yes.

Q. Which is a company incorporated in England? A. Yes.

Q. And the remaining seven shares were held by a Mr. Benbow, a Mr. Nottingley, yourself, a Mr. Fraser, a Mr. Gregory and Mr. Jones, and a Mr. Middleton? A. That is correct. 20

Q. Each one share? A. Yes.

Q. Do you know where were the shares in May 1970 of Finance or New Holdings Finance Company Limited? A. No I do not.

HIS HONOUR: I see why you took some objection to what I said a moment ago about the Australian company being a subsidiary of the English company; but I think the witness said that. 30

MR. GLEESON: No. The witness said they were members of the company which had the one beneficial owner, and my learned friend's questions are related to shareholding.

HIS HONOUR: I am sorry.

MR. GLEESON: I think the truth of the matter is that no doubt there are some accountants in England who can explain the precise detail, with precise detail the interlocking or inter-relationship between these, the 40

company and the Blue Star Company I had thought was controlled by the one family, and I had not thought there was any dispute about that.

HIS HONOUR: If I were a director of a company, I would want to know where the beneficial shareholders were. (Discussion ensued).

WITNESS: I do not know the registered share-
10 holders. (Further discussion ensued).

MR. SHELLER: I can only go on what is the share holding, and I don't propose to pursue it any further.

Q. Mr. Dean, is it correct that Joint Cargo Services arranged with the Maritime Services Board to have No.2 wharf, Glebe Island made available for the berthing of the New York Star in May 1970? A. That is so, yes.

Q. And is it correct that Joint Cargo
20 Services paid the tonnage and wharfage rates in respect of that use of the wharf? A. That is so.

Q. And the entry of the vessel into Sydney on that occasion? A. That is so.

Q. And also paid outgoings on the wharf, such as electricity and matters of that sort? A. Yes.

Q. To the Maritime Services Board? A. Yes.

Q. Is it correct that to some extent the
30 activities of the stevedores were directed by Captain Harris? A. The activities, as I say, of the stevedoring, his actual control of the labour on the job, which is controlled by the stevedoring company.

Q. Yes. But Captain Harris directed, or directed the number of gangs and so on that would be employed and matters of that sort? A. He started off by making, I suppose, say, five days and four nights and the stevedoring
40 would say "We are short of labour? Why don't you work three days and four nights?" It is a matter of arrangement between the two.

Q. And Captain Harris is an employee of Joint Cargo Services? A. He was, at that time.

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Herbert Dean

Cross-Examination (continued)

Q. He visited the wharf once a day? A. At least I would say -- certain times I would suppose he goes down three or four times a day.

Q. I suppose when cargo goes from the wharf it is brought to Captain Harris' attention. Is that correct? A. It should be, but I am not aware. There might be somebody else in the office such as Mr. Clayton or the insurance and claims, but somebody in Joint Cargo office would be told that day. 10

Q. So it would be correct to say in May 1970 Joint Cargo Services would exercise some overall supervision over what was going on on No.2 wharf, Glebe Island? A. Not in the true meaning of the word, I don't think.

Q. Any other meaning? A. They supervise the stevedores to some extent, or advise the stevedores. That would be the better word, but they did not say "To perform at No.2 you must do this and that" -- that is entirely up to the stevedores. 20

Q. But they no doubt kept an idea of where the cargo was stacked on the wharf? A. Whom do you mean by "they"?

Q. Captain Harris and others who, from time to time went to the wharf? A. No. I don't think it is in the concern of Captain Harris; concerning the use of the space of the shed is made -- 30

Q. So he would be concerned with efficient use of the space of the shed? A. That is so.

Q. And would he be concerned with other things as to the use of the shed? A. As to the use of the shed in what way?

Q. Can you think of any other way of the use of the shed? You have referred to one as efficient use of storage? A. No. I can't. 40

Q. You can't? A. No.

(Further hearing adjourned until 10:00 a.m. on Thursday, 10th April, 1975)

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COMMON LAW DIVISION)
COMMERCIAL LIST)

CORAM: SHEPPARD, J.

SALMOND & SPRAGGON (AUSTRALIA) PTY. LIMITED

v.

JOINT CARGO SERVICES PTY. LIMITED & ANOR.

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10 SECOND DAY: THURSDAY, 10TH APRIL, 1975

(Two pages photostatted from Cargo Delivery Book tendered without objection and marked Exhibit D.)

HERBERT DEAN
Recalled on former oath:

CROSS-EXAMINATION CONTINUED:

MR. SHELLER: Q. Mr.Dean, you know a gentleman by the name of Captain Hann? A. How do you spell that?

20 Q. I think H A N N. A. I seem to recall there was a man employed by Port Jackson by that name.

Q. But you are not certain about that? A. No.

Q. Would you know whether Captain Hann was the Operations Supervisor in respect of this particular charge of cargo? A. I am not aware whether he was or not.

Q. Mr. Dean, do you know when the discharge
30 of the New York Star was completed in May 1970? A. No.

Q. Or when the vessel left its berth in Sydney? A. No.

Q. Is that a matter of which Captain Harris would be aware? A. I do not think he would be aware of the dates if you asked him this morning unless he looked them up in the last couple of months, but they are readily available on the files of the Blue Star Line.

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Herbert Dean

Cross-Examination (continued)

Q. After a vessel such as the New York Star leaves a berth such as No.2 wharf, Glebe Island, is it right that there is a certain amount of cargo which has been discharged from the vessel still in the wharf shed? A. Yes, that is correct.

Q. And what arrangements are made about that cargo still in the wharf shed? A. There are delivery clerks still down there and they would then advise the consignees the vessel had sailed and their cargo was still in the shed and unless they took it away within a certain number of days it would go into bond. 10

Q. Is the number of days usually three days after the departure of the vessel? A. I think that was the arrangement with the M.S.V. during that period.

Q. If the cargo is still there after three days, it is then put into bond? A. Well, not every time. The M.S.B. depending on shed space, are inclined to be lenient. 20

Q. At any rate, at some period of time, three days or shortly thereafter the cargo is removed from the wharf shed? A. Yes.

Q. And put into store somewhere else? A. Yes.

Q. Who makes the arrangements for the storing elsewhere? A. Joint Cargo.

Q. The name I mentioned to you, would you know a Captain N. Hane? A. I think that is a name I do remember, not Hann. 30

Q. Was he an employee of Joint Cargo Services? A. My recollection is that he was an employee of Port Jackson Stevedoring Company.

Q. Do you recollect whether or not he was Operations Supervisor in respect of this discharge? A. I would not know, even at the time.

Re-examination

RE-EXAMINATION

MR. GLEESON: Q. I am referring to p.29 of the transcript, the three last questions before the conclusion of the examination in 40

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Herbert Dean

Re-examination (continued)

chief of Mr. Dean. You may recall yesterday I asked you a couple of questions about the standard form of Bill of Lading that was used by the Blue Star Line? A. Yes.

Q. And you said it was generally approved of by people like Joint Cargo Services and ship owners; that such standard form of Bill of Lading contained clauses aimed at conferring certain exemptions on people who were agents of the shipowner? A. That is so.

Q. I asked you this question, and I am not sure that your answer to it came out very clearly. I will repeat the question, if I may: "Q. And it was common knowledge amongst other things that those clauses were devised to confer exemptions and exclusions not only on the ship owner itself but also on its agents?" What do you say about that? A. I think I would have said "Yes".

Q. I am then recorded as having asked you: "Q. But that was generally approved of?" "By people like Joint Cargo Services and the ship owners?" I think if that is what I asked you I intended to ask you that was generally approved of by people like Joint Cargo Services and the stevedores. Would that be correct? A. You are asking me if at the time of drawing up the Bill of Lading, we speak to the stevedores?

Q. No. I am asking you whether it being general knowledge amongst people in the kind of business you are in that a standard form of Bill of Lading contained exemption clauses of that kind? A. Yes.

Q. Was that generally approved of by people like Joint Cargo Services and stevedores? A. It would be approved of by Joint Cargo Services because they are the owners' agents for the vessel concerned and therefore they are acting as agents for the Blue Star Line Limited.

Q. I omitted to ask you in chief - and it is only a minor matter, if I may have your Honour's leave: on what method is Joint Cargo Services remunerated for the services it performs for the ship owner? A. By a commission on inward cargo or on outward cargo which is negotiated by the owner of each shipping company. It could vary from company to company.

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Re-examination (continued)

Q. The commission is paid or calculated ship by ship? A. Yes.

(Witness retired and excused)

Ian Errol Harris

Examination

IAN ERROL HARRIS
Sworn and examined:

MR. GLEESON: Q. What is your full name? A. Ian Errol Harris.

Q. Do you live at 64 Stanley Street, Forestville? A. Starkey Street.

Q. In May 1970 were you employed by Joint Cargo Services Pty.Ltd. as Assistant Marine Superintendent? A. Yes. 10

Q. I think Joint Cargo Services acted as ship's agent in the port of Sydney for a number of shipping lines? A. Yes.

Q. And you were the person in Joint Cargo Services who used to do the work, if I may use that expression, for the Blue Star Line? A. Yes.

Q. There was another gentleman, Mr. McDonald, who was your superior? A. Yes. 20

Q. And he from time to time would sign documents on behalf of Joint Cargo Services relating to its function as ship's agent? A. Yes.

Q. When it came to the actual detail of doing things in relation to Blue Star Line vessels, you were the man? A. Yes.

Q. You recall the vessel the New York Star,

the Blue Star Line vessel, berthed at Glebe Island Wharf in May of 1970? A. Yes.

Q. And were the duties and functions you had to perform in relation to the New York Star any different from the duties and functions you normally performed in relation to Blue Star Line vessels? A. No, just the normal duties.

Q. Can you tell us what those duties were, what the system was and what you in fact did in this case? A. Prior to the ship's arrival when we received cargo plans and documents these were passed on to the stevedoring company, Port Jackson Stevedoring for examination of the plans and for them to assess the discharge hours in each compartment. On receipt of this information from the stevedores, we then apply for a berth to the Maritime Services Board to place the ship alongside for discharge of cargo. On allocation of a berth at the harbour board, the stevedoring company sent its supervisor down to have a look at the berth to see if it would be suitable for the type and quantity of cargo to be discharged by the vessel. If the supervisor was satisfied with the berth and the condition of the berth, he contacted me and I either recommended we accept the berth or reject it and go for another one. In this case we accepted No.2 Glebe Island for the discharging operations of this vessel.

Prior to the ship's arrival, on the day before the ship's arrival, we would discuss with the stevedoring company the number of gangs to be employed for the discharge of the ships. The gangs are ordered to cope with the space available in the shed and also with the number of working gear in the vessel.

Q. Who employs the members of the gang? A. The stevedoring company employs the labour.

Q. At that time I think the stevedoring company that used to do the stevedoring work for all the Blue Star Line vessels coming into port was Port Jackson Stevedoring? A. Yes.

Q. And you were in almost daily contact with Port Jackson Stevedoring Company? A. Yes. I am in daily contact with the manager of the stevedoring company regarding labour to be

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Examination (continued)

worked on the ship, overtime to be worked on the vessel, week-end work and so on, to work to a programme to complete the vessel and sail by a certain date.

Q. So far as Joint Cargo Services in May 1970 when Blue Star Line vessel was coming into port, can we take it there was not any question of who the stevedore was going to be? A. No.

Q. It was invariably Port Jackson Stevedoring? A. Yes. 10

Q. Do you have any functions to perform in relation to giving some publicity to the impending arrival of the vessel? A. No. On accepting the berth, we notified the Inward Freight Department.

Q. Of your own company? A. Yes.

Q. That is Mr. Clayton? A. Yes.

Q. He would take some steps to publicise -? A. Yes, he would publicise the arrival of the ship for the consignees. 20

Q. So consignees would know their cargo was due to arrive and when and where it was coming? A. Yes.

Q. Mr. Clayton would also be the man who would attend to the shipping documentation? A. Yes, that is correct.

Q. As Marine Superintendent, having made the necessary arrangements with the Maritime Services Board for the booking of a berth and having notified the stevedore of the impending arrival of the vessel and had the communications with the stevedore of the kind you had described to us, what further duties would you have to perform if any in relation to the cargo after arrival of the vessel? A. Liaise between the stevedores and the ship's officer, the ship's officer and the Master of the vessel, regarding setting up of cargo gear, setting up heavy lifting derricks and any other preparatory work that had to be done by the ship's crew to assist the discharge. 30 40

Q. Your function was one of liaison between the ship's Master on the one hand

or officers on the one hand and the stevedores on the other? A. Yes.

Q. In relation to the unloading and storage and ultimately delivery of the cargo to the consignee or somebody who might have been sent along by the consignee to collect the cargo, by whom were the people who would be involved in that employed? A. By the stevedoring company.

10 Q. Would they include such people as the gangs that have already been referred to, the waterside workers? A. Yes.

Q. Watchmen? A. Yes.

Q. Tally clerks? A. Yes.

Q. Delivery clerks? A. Yes.

Q. The berth at which the New York Star arrived was in fact, a berth owned by the Maritime Services Board? A. Yes.

Q. And there was on the berth a shed for
20 the storage of cargo? A. Yes.

Q. And that included the dead house? A. Yes.

Q. Which was a place that was capable of being locked? A. Yes.

Q. Who would have the key to the dead house? A. The watchman would keep the keys normally during the discharge of the ship, the head watchman.

Q. What about the Maritime Services Board?
30 A. The Maritime Services Board - I don't think they had any function of locking up the shed.

Q. They were the actual owners of the shed? A. Yes.

HIS HONOUR: Q. When you say the watchman would have the key, I can understand he would have it when he is on duty, but what happened as one watchman went off and another came on? Was it handed over from one to the other?
40 A. If they were changing shifts, yes. At the termination of the shift and the shift was to stop work for a period of time and another shift

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Examination (continued)

was eight hours in between, the key should be delivered to the terminal area where the security personnel were, the central point where the keys are held.

Q. Was there always a watchman there throughout 24 hours of any day? A. I would think so, but I'm not sure of that. I haven't visited that area of the dock.

Q. Assuming there was no watchman on duty in the late hours of the night, where would the key go in those circumstances? A. Watchmen are present at all times. Once there is cargo in the shed there is a watchman continuously. 10

Q. It would be a matter of one handing it over to his relief? A. I'm not sure about that.

MR. GLEESON: Q. I suppose it happened from time to time that the ship would be ready to leave or would, in fact, leave and the consignee would not have collected their cargo from the wharf? A. Yes. 20

Q. What would happen about the cargo in those circumstances? A. Generally, the Maritime Services Board allowed three days for deliveries after which any cargo left on the berth comes under what they called storage.

Q. Who would be looking after the cargo over that period, normally, of three days? A. Stevedoring company's delivery clerks and tally clerks are still in the area until the cargo is despatched from the berth. 30

Q. If it remains uncollected it is delivered into the custody of the bond? A. Yes, on the instructions of Mr. Clayton.

Q. Was it your practice from time to time to visit the wharf yourself when a Blue Star Line vessel was in port? A. I visited ships every day, generally at the start of work, 7.30 in the morning. 40

Q. Normally, how many times a day? A. Normally once a day unless there were any problems and I had to go back.

Q. What was the purpose of your visit to discuss with the supervisor the discharge operation, the gang strengths employed in

the ship and that had to be employed on the next day and anything untoward that might happen. If there is any problem he has with the ship, by the ship's people or if he wants any special derricks or rigs to assist in the discharge.

Q. Apart from yourself would it be normal for any other employee of Joint Cargo Services to visit the ship?
10 A. Only the superintendent of engineering to deal with engineering repairs on the vessel.

Q. Was it the custom in the port of Sydney as of May 1970 and at the present day, for that matter, that stevedores be employed in the unloading and storage and delivery of cargoes? A. Yes.

Q. That was a general practice? A. Yes.

Q. It had been the general practice
20 for many years prior to May 1970? A.Yes.

Q. In relation to the vessel, the New York Star, did you observe anything unusual or untoward about the system that was being employed by the stevedores in relation to the unloading or storage or delivery of the cargo? A. No.

Q. I think, in fact, you did not find out about the fact that these goods the subject of these proceedings were missing
30 until either late in the day that they were missing or the next day? A. The following day.

Q. You certainly did not have any personal contact with the loss of the goods? A. No. I have nothing to do with the delivery of the cargo after discharge from the vessel.

Q. I show you a photocopy of a document on a Maritime Service Board form headed
40 "Application for berth". It bears dates around 7th May. There are various dates on it but they run from 7th May to 11th May. Was this, or is this a copy of the application for berth that was made to the Maritime Services Board in relation to the New York Star when it came to Sydney in May 1970? A. Yes.

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Examination (continued)

Q. Do you recognize one of the signature above the date 1970 on that as the signature of Mr. McDonald, the gentleman in the employ of Joint Cargo Services that you told us about earlier? A. Yes.

Q. There is a reference under the heading "Name of Operations Supervisor" of a gentleman. A. That is Captain Haim.

Q. How do you spell that? A. H A I M.

Q. Do you recognize his signature alongside that? A. Yes. 10

Q. Who is Captain N. Haim? Who was he employed by in May 1970? A. Port Jackson Stevedoring Company.

("Application for berth" document tendered without objection and marked Exhibit 3).

Cross-Examination

CROSS-EXAMINATION

MR. PARKER: Q. How long had you held the position that you describe in May of 1970? 20
A. I had come ashore with Blue Star Line to work as an Assistant Marine Superintendent in July 1962.

Q. You had been in that position about eight years? A. Yes.

Q. Had you been working in the position that you have described to Mr. Gleeson for that eight years? A. I was with Blue Star Line as chief officer and Master. 30

Q. When did you first start to do the work you have described to Mr. Gleeson? A. In 1962.

Q. You said your duties encompassed liaising with the ships' officers in connection with the cargo gear and the derricks and so forth? A. Yes.

Q. Did I understand you also to mean by that you liaised with the stevedore? A. Exactly. 40

Q. One of the purposes of you going to the wharf would be to see, as you have said, that everything was going according to the rules? A. Yes.

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Cross- Examination (continued)

Q. I also understand you to make a comment about the system that prevailed on the wharf. You said to Mr. Gleeson you observed nothing untoward in the system? A. Yes, that is correct.

Q. By which I understand you understood the system that prevailed with respect to delivery? A. I am not actually concerned with delivery of cargo.

10 Q. Just answer my question. My question was did you know the system that operated? A. Yes.

Q. You knew there was a delivery clerk. A. Yes.

Q. And there was dead house that you have described? A. Yes.

Q. And that certain items of cargo were placed in the dead house and other items placed in the shed? A. Yes.

20 Q. There was the watchman in the dead house? A. Yes.

Q. There were watchmen in the shed? A. Yes.

Q. And you knew, did you not, the practice that a consignee followed when he was required to obtain possession of the goods he had come for? A. Yes.

Q. When you answered Mr. Gleeson's questions that you said you did not 30 observe anything untoward in the system, you were referring amongst other things, to that particular system? A. Yes, that is correct.

Q. I suppose that if anything untoward had existed or come to your notice in that system you would have made comment about it? A. I would have made a comment to the manager of my company.

Q. In the hope that some sort of 40 reformation of the system would take place? A. This is correct.

Q. The Captain Haim that is referred to in the document, Exhibit 3, that Mr.Gleeson

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Cross-Examination (continued)

showed you was the person who was concerned with the operation on the day in question? A. Captain Haim is classed as Operations Supervisor but he was not the supervisor on the shift that was working.

Q. Did you understand him at that time to be directly responsible to Captain Devonport in the stevedoring company? A. At that time I would say Captain Haim would have been responsible to Captain Briggs. 10

Q. You do know Captain Devonport? A. Yes.

Q. Do you recognize him in Court? A. Yes.

Q. You do recall, do you not, that he was the Assistant Stevedoring Manager in Port Jackson at that time? A. Yes.

Q. And had you seen him on occasions about that time? A. Well, normally I see Captain Devonport once a week, normally on Fridays. I did not make a practice of calling at the Stevedoring Company every day. 20

Q. The New York Star was a reasonably large vessel? A. At that particular time it was a four hatch ship, not a very big ship.

Q. You say not a particularly big ship? A. No.

Q. But it had four hatches? A. Yes.

Q. The cargo was discharged on to the wharf, which I take it quite possibly made the wharf quite congested? A. I cannot recall that at this stage. 30

Q. Speaking generally, vessels of the size of the New York Star discharging from four hatches, required a considerable effort, did they not by and on behalf of the stevedore and others to get the goods onto the wharf and cleared? A. This is entirely dependent on the amount of cargo and the nature of the cargo in the vessel. If the vessel came with 3,000 ton you will have a problem; 300 ton, no problem. 40

Q. How much did the New York Star have? A. I would say about 2,900 measurement,

rough figures.

Q. You would agree that in performing its duties the stevedoring company in employing its men, there is considerable activity upon the wharf while the discharge is taking place? A. Yes.

Q. That discharge takes place, does it not, throughout a whole day, a period of 24 hours? A. Not necessarily.

10 Q. Was that happening on this occasion? A. I can't recall that.

Q. You will agree that quite frequently there is a degree of confusion existing on the wharf because there are so many people at work? A. No, I do not agree with that.

Q. You will agree there is much activity on the wharf? A. Yes.

Q. Do you know anything about the gates at Glebe Island? A. I do know from my
20 visits to the wharf there were two gate areas, the inward gate that came off the main road past Glebe Island Bridge.

Q. And there was one gate, what has been called the main gate, and the Robert Street Gate? A. Yes.

Q. Do you recall how that particular gate was manned, those gates? A. Normally manned by security watchmen.

Q. They were employed as far as you know
30 by an organization other than the stevedoring company? A Yes.

Q. You recall on this occasion when the incident occurred which is the subject of this litigation whether the New York Star had gone? A. No, I can't recall that.

MR. SHELLER: Q. Captain Harris, would you look at Exhibit 3. It appears to state that the vessel started on 17th May, 1970. Would you agree with that? A. It is lodged
40 as such on the Maritime sheet.

Q. As having left on 17th May? A. Yes.

Q. You would have no reason to doubt the

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Cross-Examination (continued)

vessel left on that day? A. No.

Q. Would you look at Exhibit D. These are two pages photostatted from the Cargo Delivery Book with respect to the discharge of the New York Star. You will observe in the larger of the two sheets five columns across. There are a number of what appear to be dates. The top one is 19.5, 11.5 and so on? A. Yes.

Q. Would you be able to agree with me that those figures indicate the date upon which the cargo there described was delivered to the consignee or its carrier? A. I am not quite conversant with the layout of the delivery book because I have nothing to do with it in my duties, but I would assume those were the dates. 10

Q. If that were right, it would indicate some of the cargo was delivered as late as 26th May, 1970? A. Yes. 20

Q. You told Mr. Gleeson you observed nothing unusual or untoward about the system being employed with respect to the storing and delivering of cargo from the wharf? A. Yes, that is correct.

Q. Is it right that you were familiar with the system employed at this stage by Port Jackson Stevedoring? A. Yes.

Q. Is it right that goods which were of a type specially prone to pilferage were stored in the dead house? A. That is normal practice. 30

Q. The dead house was a place of special security? A. Yes.

Q. Is it right that the dead house was in charge of a watchman? A. Yes.

Q. The watchman being an employee of Port Jackson Stevedoring? A. For that particular time he would be, but he was a casual watchman. 40

Q. That is to say, somebody picked up according to the roster system from the bin? A. Yes.

Q. Is it right that there was no control

over who came and went on the wharf?
A. Do you mean that particular wharf or the wharf area?

Q. No.2 Glebe Island Wharf; I am talking about May 1970. A. No.

Q. That is not correct? A. No.

Q. Who was in charge of controlling the people that came and went on the wharf in May 1970? A. Anyone who comes into the
10 wharf -

Q. Who was in charge of the control of who came and went on that wharf in May 1970?
A. I couldn't answer that one, sir.

Q. You do not know? A. No.

Q. Could you give me any indication of who should have been in charge? A. I can only tell you from the point of view of the vehicles that come into the wharf, cars or trucks had to pass through the check point
20 and should be checked by the gatekeeper, the man who manned the check point.

Q. Is the practice merely to permit vehicles to go through the gate and simply take a note of the number? A. Yes.

Q. Is it right that no check is made of the authority of the driver of the vehicle to come into the wharf area? A. I have always been questioned as to my identities when I have driven in.

30 Q. At no.2 Glebe Island every day you went there? A. Yes.

Q. Are you quite sure about that? A. Yes.

Q. Which gate did you enter by? A. The gate that comes off the main road.

Q. You went there every day? A. While I had a ship in the berth.

Q. When the New York Star was there, you went there every day? A. Yes.

Q. And every day you were questioned as to
40 your identity? A. My car was stopped because they had a swing gate at the time.

Q. A swing gate? A. Yes, a lift-up type of gate at that particular period.

Q. When you say a lift-up type of gate, I may be wrong, but I would understand a swing gate to be a gate that opened and shut from side hinges? A. Whichever way you liked. The gate, as I understand was one that went up.

Q. A boom type? A. Yes.

Q. And you can recollect that? A. As far as my memory serves me. 10

Q. You went there first thing in the morning? A. Yes.

Q. When you went there, when you arrived at the gate, was the boom up or down? A. Down generally.

Q. Would it be correct to say that anybody could walk through the wharf shed? A. Yes.

Q. Would it be correct to say that if anybody drew up in a truck to the wharf shed, they could walk in? A. Yes. 20

Q. Would it be correct to say that a person could load goods out of the dead house without producing any authority to the watchman of the dead house to do so? A. I am not in a position to answer that because I was never in charge of the dead house.

Q. I am talking about this sytem. A. It should not have been possible.

Q. But was it possible at that time? A. I don't know. 30

Q. Were you familiar with the system being then employed? A. Yes.

Q. Was it possible or not? A. I would say no.

Q. You would say no. Do you know one way or the other? A. I beg your pardon?

Q. Do you know one way or the other? A. On the system then the man should have had a tally clerk to check him out, so he should not have delivered goods without a check tally. 40

Q. I am asking whether somebody could load goods out of the dead house without producing any authority to the watchman of the dead house. (Question objected to).

Q. I am talking about the system being employed by the Port Jackson Stevedoring at the time they were unloading the New York Star on No.2 Wharf, Glebe Island. You appreciate that? A. Yes.

10 Q. Of the system then used in the discharge and delivery, storing and so on of goods at the wharf. Do you understand that? A. Yes.

Q. Would you agree with me that in accordance with that system a person could load goods in the dead house onto a truck without producing any authority to the watchman of the dead house. A. It is very difficult to answer that question with a Yes or No. It should not be possible.

20 Q. But was it possible under the system then employed by the Port Jackson Stevedoring? A. I do not know.

Q. You do not know. Were you present in Court yesterday when Mr. Bowdler gave his evidence? A. Yes.

Q. Two lines up from the bottom of p.9, referring to the activities of the man who removed the cartons of razor blades from the wharf: "Q. What did he do then? A. I watched 30 him go out of the door of the wharf out to the delivery office and naturally I thought he had gone around to the delivery office and when he came back I said 'Have you seen the dead clerk?' He said 'Yes'. I said 'All right, get a tally and take the numbers of the ones that are not pillaged which you are taking.' Naturally, he didn't have to show me anything".

Was that the system as you understand it 40 being then employed by Port Jackson Stevedoring, that naturally a man taking goods from the dead house did not have to show anything to the watchman in charge of the dead house? A. I'm not aware of that.

Q. You do not know one way or the other? A. No.

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Cross-Examination (continued)

HIS HONOUR: Q. Did you not make any enquiries ever to find out what their system was? A. I knew what the system should have been, but the practice changes from stevedoring companies or by the ship or by the people employed.

Q. When you say you knew what the system should have been, what system are you then referring to? A. The system that the person who comes to pick up the goods goes through to the delivery clerk, then gets a tally out, produces the note from the tally clerk and that is taken back to the delivery clerk who gives him a gate pass to get the goods out of the gate. Normally, the tally clerk goes with the man to check the goods out while it is being loaded. He checks them on to the truck and checks the numbers. 10

MR. SHELLER: Q. Was it the system that somebody going to collect goods from No.2 wharf, Glebe Island in May 1970 was not required to produce any document to either the tally clerk or the watchman before he started to load the goods? A. No. 20

Q. That was not the system? A. No.

(Short adjournment)

HIS HONOUR: You remain bound by the oath you took earlier, do you understand?

WITNESS: Yes.

MR. SHELLER: Q. What documents of authority have to be produced according to the system by the consignee for its carrier to the tally clerk or the watchman? A. To the delivery clerk it would be the bill of lading. 30

Q. To the tally clerk or the watchman? A. The bill of lading.

Q. The bill of lading? A. Yes.

Q. To the tally clerk? A. Yes.

Q. Was the procedure that the consignee or the carrier would first present the bill of lading to the delivery clerk? A. Yes. 40

Q. Did not the delivery clerk retain the

bill of lading? A. I don't know.

Q. You don't know? A. No.

Q. It is not right is it that the consignee or the carrier would take the bill of lading, having presented it to the delivery clerk, out to the tally clerk? A. I don't know.

Q. Would you agree with me that a system whereby a carrier or consignee could obtain goods without producing a document of authority to the tally clerk would be a highly defective one? A. Yes.

Q. You told Mr. Gleeson that as far as your observation went the system was operating in a proper manner at No.2 wharf Glebe Island? A. To my knowledge at that time, yes.

Q. Tally clerks are also casual employees are they not? A. Yes.

Q. Was there under the system applicable in May 1970 anybody present to supervise the tally clerks? A. I don't know that.

Q. Or to supervise the dead house watchman? A. I don't know.

HIS HONOUR: Q. Are these matters because you are the shipping agent and not the stevedores simply of no interest to you? You leave it to the stevedore to do what he thinks is appropriate? A. They are directed to do that. Despatch of cargo and delivery of cargo and discharging from the ship. My duties are solely concerned with the ship principally.

MR. SHELLER: Q. Is it right to say that so far as Joint Cargo Services were concerned the system employed by the stevedores was simply not a matter of concern to them at that time? A. It is a matter of concern to employers, yes.

Q. Is it right to say that Joint Cargo Services were not then aware of what system was being employed by Port Jackson Stevedoring? A. I was not aware of it.

Q. Was there anybody else at Joint Cargo Services you know of who may have been? A. Yes, Mr. Clayton on the inward freight side would be aware of it.

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Cross-Examination (continued)

Q. Did Mr. Clayton visit the wharf during his period in May 1970? A. I don't know.

Q. Coming back to the gate again, the gate is manned by somebody who is not an employee of either Joint Cargo Services or Port Jackson Stevedoring? A. No.

Q. I am talking of course of May 1970? A.Yes.

Q. Is the gate manned by casual employees? A. I don't know.

Q. Are you aware that there were two gates whereby access could be had to No.2 Wharf Glebe Island? A. Yes. 10

Q. One of those gates was in effect the gate to No.1 wharf Balmain, is that correct? A. That is what they call White Bay.

Q. Is it right that there was no boom on that gate? A. I am unaware of that.

Q. You don't know one way or the other? A.No.

Q. The gatekeeper at that gate, would he carry out random checks on vehicles going through the gate? A. That is his duty. I would not know if he would do it. It is his duty. 20

Q. His duty to carry out random checks? A. It should be, yes.

Q. Would you agree with me that at that White Bay entrance the gatekeeper had no means of stopping somebody determined to drive through the gate? A. I don't know that.

Re-examination

RE-EXAMINATION 30

MR. GLEESON: Q. You have in front of you exhibit D which is a photocopy of some extracts from the cargo delivery book. A.Yes.

Q. Who, as the system operated in 1970, would write up the cargo delivery book? A. I am not sure but I would say the delivery clerk.

Q. At the wharf? A. I am not too sure of that procedure. It has nothing to do with me.

(Witness retired and excused) 40

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Ronald Hugh Clayton

Examination

RONALD HUGH CLAYTON
Sworn and examined:

MR.GLEESON: Q. Is your name Ronald Hugh Clayton and do you live at 7 Orana Street, Manly Vale? A. Yes.

Q. Were you in 1970 employed by Joint Cargo Services Pty.Limited? A. Yes.

Q. Was there a position, your position in that company, head clerk inwards freight?
10 A. Yes.

Q. (Showing exhibit A) Was it part of your duty to take certain action in relation to the shipping documents that would exist concerning inwards cargo for the Blue Star Line vessels? A. Yes.

Q. I show you exhibit A and I want to ask you some questions about some stamps which appear on exhibit A and the manner in which they come to be there. First of all is the
20 procedure in relation to the bill of lading that at some time after the goods have left the overseas port from which they are travelling to Australia a bill of lading or a copy of the bill of lading will be sent to the consignee here or his representatives? A. Yes.

Q. And I take it having arrived here they will be of interest to people such as banks but will the consignee in the normal course
30 either by himself or by his customs agent produce the bill of lading to the Maritime Services Board to have it stamped? A. Usually he will present it to the shipping company first.

Q. That is to say the ship's agent? A. The ship's agent.

Q. The normal procedure was that the consignee or his customs agent would take the bill of lading to the ship's agent, in
40 this case Joint Cargo Services? A. Correct.

Q. That would then come into the possession of yourself? A. Temporarily.

Q. Was it your function to put on the bill of lading the stamp which we see on this bill of lading commencing with the words "Please

deliver" etc.? A. Not personally but the department which I administer.

Q. It was either put on by you or under your supervision? A. Correct.

Q. Is it the case that you or someone else under your supervision would need to be satisfied of certain matters before that stamp could be put on the bill of lading? A. Yes.

Q. Of what matters would you want to be satisfied before that stamp was put on the bill of lading? A. The type of bill of lading, the wording in particular. We check on the basis it was a signed bill of lading here which was the original bill of lading and the type of consignee. 10

Q. What about payment of moneys and charges? A. This was done by reference to our manifest. The cargo manifest covering all times of cargo for discharge at the port of Sydney. 20

Q. Would you want to check that sort of matter before you put the stamp on? A. Yes.

Q. What would you be checking to see in that regard? A. That the marks and the numbers on the bill of lading here and the number of cartons or the number of packages of cargo were the same as those on the manifest. 30

Q. Would you ckeck to see whether freight had been paid? A. Yes. That would also be part of the manifest. The manifest details the amount of money to be collected.

Q. Is it the position that if the freight had not been already paid you would require it to be paid before you would put a stamp on the bill of lading? A. Yes.

Q. Alternatively if the freight had been paid you would note that fact before putting the stamp on the bill of lading? A. Mentally, yes. 40

Q. What other charges would you want to satisfy yourself had been paid before the stamp would be put on the bill of lading?

A. There would be only one other stamp - it is not so much a question of putting a stamp on, it is the signing of the stamp. At that particular time we would need to collect the sorting and stacking which is a charge made on behalf of the stevedores.

Q. Do the stevedores make and collect a charge for sorting and stacking? A. Correct.

Q. In due course do you account to the stevedores for that money? A. Yes.

Q. Is it also a function or the ship's agent to advise various public authorities of the pending arrival of the vessel? A. Yes.

Q. Would they include the Maritime Services Board, Her Majesty's Customs and quarantine? A. Yes.

Q. I think the marine section of the company would contact the Harbour Master and make arrangements for having a berth made available by the Maritime Services Board? A. Yes.

Q. After the stamp to which reference has just been made is put on by your company, on to the bill of lading, what then happens to the bill of lading? A. The bill of lading is returned to the consignee or his agent.

Q. That usually means physically handing it back to him over a counter? A. Yes.

Q. He then takes it away with him? A. Yes.

Q. And then in due course presents that at the wharf? A. After having gone to the Maritime Services.

Q. There is a stamp on that put on in green by the Maritime Services Board. That in the normal course is put on after the stamp from the ship's agent? A. That is the custom.

Q. What is the purpose of that stamp? A. To notify or to clearly indicate to the delivery clerk that the Maritime Services Board has correctly reviewed their wharfage charges.

Q. That is the delivery clerk down at the

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Examination (continued)

wharf? A. Yes.

Q. Who is an employee of the stevedore? A. Yes.

Q. I think it is common ground that the actual unloading and storage and delivery of the goods to the consignee is in the normal course, or was then, attended to by employees of the stevedore? A. Yes.

Q. Would you yourself in the normal course go down to the wharf for any purpose? A. No.

Q. Were you aware or do you believe you were aware of the system that was employed by stevedores, the Port Jackson Stevedoring, as at May 1970 in relation to unloading, storage and delivery of cargo? A. Yes. 10

Q. Was it your belief that the system they employed was the system that had been customary in the Port of Sydney for years? A. Yes.

Q. And as you understood the matter what did that system entail in terms of what the consignee or his representative would actually physically do to take delivery of goods on the wharf? A. After completing all formalities in the city itself, which we have just discussed, together with customs formalities having been completed, the consignee or the agent will take these documents to the wharf in this case No.2 Glebe Island, and present them to the delivery clerk and possibly saying, "I have come for certain goods". From then on the delivery clerk would examine this document to ensure that the stamps were in place, that the warrant, which is the document produced by the Customs or at least signed by Customs to enable delivery to be made, was correct. After having satisfied himself of those points he would inform the person to go out to the shed, locate the goods, obtain a tally clerk to write out or check the tally of the goods in question. From then on after having obtained the tally he would return to the delivery clerk and produce this document and in turn be given a gate pass. From then on it would be up;to him to take it through the gate and have the goods checked out and the gate pass surrendered to the gatekeeper. 20 30 40

Q. Part of the system as you understood it was that the person taking the goods off the

wharf would have to surrender a gate pass in order to obtain exit from the wharf? A. Correct.

HIS HONOUR: Q. Of course that would only indicate that he had come in or at least had been given a gate pass. It would not have anything to do with what was on the back of the truck? A. The details on the gate pass would cover the goods that were loaded together with the marks and the number of packages.

Q. Was it the duty of the gatekeeper to check that he was taking out those goods and no others? A. Yes.

MR. GLEESON: Q. As you understood it was that the system being operated by Port Jackson Stevedoring in May 1970? A. Yes.

Q. Exhibit A, was that the standard form of bill of lading that was in use by the Blue Star Line in May 1970? A. On this particular trade, yes.

Q. Are you aware or were you then aware that it contained clauses which gave or purported to give exemption to agents and contractors who dealt with the goods as well as to the ship owners themselves? A. Yes.

Q. Did you know of that in May 1970? A. I had been told of that, yes.

Q. Was that something of which you approved? A. I had no opinion.

Q. Was it the fact that from time to time claims had been made and rejected on the ground of those exemption clauses? A. Yes.

CROSS-EXAMINATION

MR. PARKER: Q. How long had you been with Joint Cargo in 1970? A. Approximately 2½ years.

Q. Had you been doing the work you described to Mr. Gleeson for that time? A. Correct.

Q. You knew did you not that the Port Jackson company was the stevedore for the Blue Star? A. Yes.

Q. Did the Blue Star work? A. Yes.

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Cross-Examination (continued)

Q. Did you discuss the relationship with the people at Port Jackson yourself. Did you have cause to speak to them?
A. On many occasions on general work.

Q. And the form of the bill of lading that was adopted in this case to the best of your knowledge and belief followed the form that had been used on previous occasions? A. Yes.

Q. The gate passes to which Mr. Gleeson referred have some reference upon them to the goods which are taken by the consignee? A. Yes. 10

Q. A copy of those gate passes is retained is it not by your company? A. Yes.

Q. Do you know whether the gate passes that were issued in the year about the month of May 1970 are still held by your company or not? A. No.

Q. Is it likely that they have been destroyed? A. Very likely. 20

Q. Have you made enquiries about that? A. Yes.

Q. And did you from your enquiries establish the gate passes with the details had been destroyed? A. Which goods?

Q. The goods relating to this particular shipment? A. I am not aware they ever existed.

Q. What you are saying is you don't know there was a gate pass ever issued for these? A. That is correct. 30

Q. May I ask you some questions about the sorting and stacking account. That is a charge that you collect on behalf of the stevedores? A. Correct.

Q. To what does it refer? A. The physical stacking usually in bill of lading quantities in wharf sheds to which the vessel is discharging.

Q. Why is it you collect it on behalf of the stevedores? A. A matter of convenience. 40

Q. How do you actually do that? A. The bill of lading is presented at the agents

counter, it is physically checked for detail and then stamped. The amount of money detailed on the manifest is written on this particular stamp together with certain details required by the Maritime Services Board and this is the amount requested from the person tendering the bill of lading.

Q. (Showing M.f.i.B) Do you identify that as the sorting and stacking reconciliation relating to this particular vessel at that time? A. Yes.

Q. Does that represent the reconciliation of the sorting and stacking charges? A. Yes it does.

Q. By whom was it prepared? A. My department.

Q. Is there commission attached to that for the work you do? A. I am aware that there is a commission accepted by the shipping agent.

Q. Where abouts would that be shown? A. To my knowledge it would be shown in company records but not in my section.

Q. Would it be shown here? A. No.

Q. Have a look at the copy of the credit note attached to that reconciliation. Do you identify it is a credit note under the heading "Joint Cargo Services Pty.Limited"? A. Correct.

Q. Do you there see a figure for commission "less 10 per cent commission"? A. Yes.

Q. That is a charge your company makes for this particular service is it? A. It is not my responsibility to collect it. I assume so.

Q. I would like to ask you a little bit more detail precisely what sorting and stacking in the ordinary case would refer to in that final account? A. It could only be referred to as sorting and stacking.

Q. What does that mean? A. In total it means the amount of money we have collected for sorting and stacking of cargo ex that vessel.

Q. When you refer to sorting and stacking of cargo can you describe in a little bit more

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detail what you mean. When and where does that sorting and stacking take place? A. The sorting and stacking of cargo ex a vessel takes place in the shed or in the immediate area. It might not be in the shed. The duty of the stevedore is to ensure that the cargo is in a state whereby the consignee or his agent or carrier will be able to pick it up without too much difficulty and without having to shift other cargo to make it available. 10

Q. I suppose your company is concerned with the procedure that is adopted for stacking and sorting of cargo is it not? A. We are concerned that it is done correctly.

Q. If it was not done correctly you would be concerned to make some sort of comment about it would you not? A. To the Management of the stevedoring company, yes. 20

Q. (Showing exhibit 1) Do you recognise that document? A. I recognise it as a stevedoring account.

Q. Have you seen that document before? A. No.

Q. That would be the account on behalf of the stevedore to your company would it not? A. Correct.

Q. For the work which you had done in that particular vessel? A. Yes, on this particular shift. 30

Q. Is there any indication on that that the account was ready for payment, that being an invoice? A. Yes, it has been passed as correct.

Q. Does that mean it has been approved for payment by your company? A. Yes.

MR. SHELLER: Q. I want to ask you some questions about the system operating on the discharge and delivery of goods at No.2 Wharf Glebe Island in May 1970. As I understand it you were familiar with the system then being operated by Port Jackson Stevedoring? A. Yes. 40

Q. And you were familiar at that time? A. Yes.

Q. You told His Honour that the consignee

or carrier presented to the delivery clerk the bill of lading and the customs warrant? A. Yes.

Q. Is it correct that the delivery clerk having examined both documents retained them? A. Correct.

Q. The delivery clerk then informed the consignee or carrier where the goods were located? A. No. He instructed him to find out where they were stowed by going to the shed.

Q. I suppose he would tell him he should go and enquire from some particular person? A. Correct.

Q. Who would he tell him to enquire from? A. It would be necessary for him to approach a tally clerk in the particular shed where the goods were located.

Q. So if we are talking of No.2 wharf Glebe Island it would be necessary to enquire from a tally clerk in No.2 wharf shed? A. Correct.

Q. Is it right that the person approaching the tally clerk to make that enquiry would be armed with no document of authority from the delivery clerk? A. That is correct.

Q. He would then, assuming the goods were located, ask the tally clerk to write out a tally ticket when his goods were located? A. Procedurally, yes.

Q. What does the qualification procedurally confer? A. The manner and size of the consignment.

Q. His duty in the first place would be to ensure that there were a certain number of articles there and after having satisfied himself of that and as to the marks he would inform the person looking for the goods that he could load them and his tally ticket would then be equal or at least the same as were the goods located.

Q. Let us take the example of 37 cartons of razor blades. Assuming that the cartons had been on the wharf and the carrier had come to collect them he would go would he from the delivery clerk to the tally clerk and say

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Percival Albert Clifton Dermond

Examination

CASE FOR THE SECOND DEFENDANT

PERCIVAL ALBERT CLIFTON DERMOND
Sworn and examined:

MR. PARKER: Q. Would you give the Court your full name? A. Percival Albert Clifton Dermond.

Q. Your residential address? A. 62 Tinsdale Road, Arcarmon.

10 Q. You are presently secretary of the second-named defendant? A. Yes.

Q. How long have you held that office? A. Approximately 23 years.

Q. How long have you been with the company? A. 23 years.

Q. That position as secretary of the company, you have become familiar have you not with the relationship between your company and Joint Cargo, the first-named defendant? A. Yes.

20 Q. And in fact you have acted as stevedores in association with that company for a number of years in connection with the Blue Star Line? A. Yes.

Q. (Showing exhibit A) Do you recognise that as a bill of lading issued under the heading of Blue Star Line? A. It is the type of bill of lading issued on the Blue Star Line, yes.

30 Q. You are familiar with the form of that bill of lading are you not? A. Generally speaking, yes. I have no intimate contact with bills of lading ordinarily. I know of their existence and this form which they take.

Q. You have in cases prior to 1970 been familiar with the sort of bill of lading which has been used by Blue Star? A. Yes.

Q. And particularly that clause in the bill of lading which purports to give some exemption to independent contractors? A. Yes.

40 Q. Would you look at this plan. Do you identify that document as a plan of Glebe Island wharf as it existed in 1970? A. To the

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Examination (continued)

best of my knowledge, yes.

(Plan tendered and marked Exhibit "4")

Q. Would you look at exhibit 1. Do you remember that as an account sent by your company to Joint Cargo Services? A. Yes.

Q. For certain stevedoring work carried out by your company for the first-named defendant? (Objected to by Mr.Gleeson; question disallowed) 10

HIS HONOUR: The question can be amended to read, "Do you recognise it as an account for certain work carried out by your company on the New York Star"

WITNESS: Yes.

MR. PARKER: Q. Certain work was carried out on the New York Star in the month of May 1970? A. Yes.

Q. Certain men were employed by your company for the purpose of performing those duties? A. Yes. 20

Q. Amongst your responsibilities as secretary was your concern for the oversight and supervision of the people who are employed in the sense of preparing their wage records and so forth? A. Yes.

Q. There are in existence are there not certain wage records relating to the people who were employed by your company at this particular time? A. Yes. 30

Q. Have a look at the documents which I show you. I ask you whether these documents identify the persons who were on duty in connection with this particular stevedoring? A. There are two forms here. The first form which is ruled in blue concerns the times spent on behalf of the wharf clerks on the New York Star from the commencement of the vessel to the finish of delivery.

Q. My question is does either one or both of these documents show it was used to perform the tasks of the stevedores? A. Clerks and watchmen only, not the labour. 40

Q. Was there a head supervising watchman

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Examination (continued)

employed? A. Yes there was.

Q. On this occasion his name was Mr.Hurst? A. Mr. Hurst had an administrative duty. He was not employed particularly on the New York Star.

Q. He had an administrative position as heading supervising watchman? A. Yes.

Q. And under him there was wharf watchman supervisor, Mr. Bowdler? A. Yes.

10 Q. There was also concerned at administrative level a head clerk called Mr.McCarthy? A.Yes.

HIS HONOUR: Q. Mr. Bowdler was not a permanent employee of yours? A. No, he was a casual man.

Q. He was employed during periods this ship was being unloaded? A. Yes.

MR. PARKER: Q. In addition to that the firm employed a delivery clerk, Mr. Glover? A. Yes.

Q. And he had an assistant delivery clerk
20 who assisted him? A. Yes. Mr. Glover was permanent and the assistant delivery clerk was a casual.

Q. In addition to that did your company employ a head stacker? A. Yes.

Q. And the head stacker's name was McDonner? A. Yes.

Q. In addition to that there were delivery clerks or tally on clerks also who assisted? A. Yes.

30 Q. Can you tell me how many tally on clerks there would have been? A. There would have been one permanent and four casuals.

HIS HONOUR: Q. Was Mr.McDonner permanent or casual? A. He was a casual.

MR. PARKER: Q. From the map you looked at which is exhibit 4 it would appear would it not that in May 1970 there were two gates which would permit entrance and exist on to the wharf? A. Yes.

40 Q. Specifically at No.2 Glebe Island where the New York Star berthed? A. Yes.

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Examination (continued)

Q. The supervision and maintenance of that particular gate was not something which your company had any concern with? A. Neither gate.

Q. Who ran or who operated the gates? A. An organisation called Osra which is Overseas Shipping Representative Association. More specifically a branch of that called Cargo Control.

Q. They were concerned to employ gate-keepers to man the gates? A. Yes. 10

Q. In the course of your experience you have had cause to visit the wharf at No.2 Glebe Island have you not? A. On occasions, yes.

Q. And you are familiar with the practice and procedure which was in operation in May of 1970 with respect to the care of cargo once it had arrived on the wharf? A. Yes, I knew the principle to be followed. 20

Q. For the assistance of the Court, to the best of your information, can I go through that particular system from the point of view of a consignee or his carrier coming to obtain goods which are stored in the dead house of the wharf? (Objected to by Mr. Sheller; question allowed) Do you understand the question? A. Yes.

Q. Could you now describe the system? A. The carrier would first bring the signed bill of lading down to the delivery clerk who would there ascertain the correctness of the bill of lading in regard to marks, number of packages, as compared with his delivery book He would also ascertain whether the bill of lading had been stamped as to sorting and stacking charges, stamped from the shipping owner's agent, secondly the Maritime Services Board stamp stating that the wharfage had been paid and thirdly a warrant in regard to the Customs saying Customs had been complied with. The delivery clerk would then retain the bill of lading and would tell the carrier to go out into the shed and obtain the services of the head stacking clerk who would indicate to him where the cargo was stacked, if in fact it was discharged from the vessel at that particular time. The stacking clerk would also say to the carrier or the owner's 30 40

representative to obtain a tally clerk to tally the goods on to the waggon. If the goods were in fact stacked in the dead house or in close proximity to the dead house the carrier would then have to go and see the watchman in the dead house to see in fact where the goods were so stacked in the dead house. The watchman would then tell the carrier to go and obtain the services of a tally clerk. The tally
10 clerk may not physically tally the goods on to the waggon, depending on the circumstances of the job, whether the cargo was homogenous or not but at the conclusion of the loading of the goods on the waggon he would issue a tally ticket which would purport to state the number of cases on the waggon, the marks and any other items on to the ticket.

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Examination (continued)

Q. Then what would happen? A. The carrier would then take the tally on ticket back to
20 the delivery clerk who would check the tally on ticket again with the bill of lading and possibly with his delivery book and issue a gate pass which would then state the number of packages, the marks, on this particular gate pass. It would then be countersigned by the carrier who would be given two copies of the gate pass and a triplicate copy kept in the gate pass book. The carrier would then take two gate passes to the gatekeeper
30 who would count the number of packages on the waggon and then would retain one of the duplicate passes, marking the number of packages on the back of the duplicate pass, the registration number of that vehicle and the time that vehicle passed through the gate.

Q. You were in Court yesterday were you not when Mr. Bowdler gave evidence? A. Yes.

Q. Mr. Bowdler being the wharf watchman supervisor of your company who was in the
40 dead house? A. Yes.

Q. Questions were asked of him relating to whether or not he should have arranged for the tally on clerk to do the tally on in the dead house. Do you remember those questions? A. Yes.

Q. Can I ask you whether in permitting the tally on clerk to prepare the tally on ticket outside the dead house Mr. Bowdler was following an approved practice? A. The answer is yes.

50 Q. Are you able to assist the Court by

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Examination (continued)

explaining why it is not necessary for the tally on clerk to perform the tally on in the dead house? A. In the first instance it necessitates the waggon going into the shed or the dead house. Because of the usual circumstances when cargo is stacked in the shed it is not possible for the waggon to approach the dead house without causing severe congestion or in fact getting there at all. Secondly if it did get into the dead house it would require physical effort on behalf of the person to lift the cartons from the ground on to the waggon four or five feet. As far as the carrier is concerned for all practical purposes it is much easier to load the waggon at dock level. The third requirement is that the clerk by union instruction is obliged to tally goods on to the waggon, not at the dead house, taking the goods when they are put on to the waggon.

Q. Could you please describe from your own experience and observations the state of activity that prevails at the wharf like Glebe Island No.2 when a vessel discharge is taking place? (Objected to by Mr.Sheller; question disallowed)

Q. If the tally on procedure, the tally on ticket was actually done in the dead house and the carrier was then permitted to take the trolley from the dead house to his waggon, is it possible that something could happen in between? A. Yes.

Q. Tell the Court what that might be? A. It is possible in transit from the dead house to the waggon that the carrier may submerge some other article of goods within his load on his truck He would then place it on the waggon undetected.

HIS HONOUR: Q. You were here yesterday when I asked Mr. Bowdler some questions after he came back into Court. A. Yes.

Q. I am still puzzled about what he said about the division of work between different union members. He as I understood it was the watchman in the dead house which was a place where goods were more likely than others to be stolen were usually kept? A. As far as practicable, yes.

Q. He does not himself look at the documents? A. No.

Q. But takes the word of the carrier apparently that he has documents and it is in order for him to remove the goods? A. Yes.

Q. Apparently even where no tally clerk is obviously doing his job even then Mr. Bowdler did not himself look at the documents? A. That is so, yes.

10 Q. Do you say that is the usual practice? A. In the light of the peculiar circumstances upon which stevedores have to work the answer is yes.

Q. How safe is that dead house as a place of security for these goods if it is the practice of your company to let goods go out of it in the presence of a watchman and tally clerk who don't look at documents at all? A. Can I elaborate?

20 Q. Yes. A. As I commenced to say, the circumstances upon which stevedores work are peculiar. They are under severe pressure from the shipowner first of all to discharge his ship as expeditiously as possible. Secondly they have to tell the consignee as promptly as possible where the goods are stacked and tell them as quickly as possible in that regard as the consignee is anxious to get his goods removed from the wharf within three 30 working days after discharge of the vessel. To that purpose the procedure of documentation has been kept to a minimum to enable this to be done. It is my contention that irrespective of any amount of documentation that may be entered into or insisted upon by the stevedores there are occasions where simply because of the volume of the cargo handled and the number of men available for work the clerical staff may or may not be swamped by this particular 40 volume of cargo and it was likely or possible for a person to go on to a wharf and tally cargo on to his waggon despite any amount of documentation.

Q. As I understood the evidence yesterday there did not seem to be a great deal of activity going on at this particular time? A. My understanding is the ship was working five days, four evenings and I think two midnight gangs at that particular time.

Q. All I am reminding you of is that you heard the evidence yourself. A. Yes.

Q. There did not seem to be a great deal of activity going on as I understand Mr. Bowdler's evidence. One of the tally clerks sitting in the sun. A. Yes. I am speaking about the system generally.

Q. I am talking about what happened on that day. A. What you say is correct. May I just elaborate again on the system generally? 10

Q. Yes. A. Taking that all into consideration again my contention is the only positive and final check on the cargo leaving a wharf is a gate because no matter how much documentation you may insist upon there are always occasions when a person can bypass that documentation system and get goods off a wharf.

Q. The only final and determining factor is the gate but the more lax your system is, if it is lax, the more likely it is that goods will disappear? A. Quite right but again depending on circumstances. The stevedoring industry, we have to satisfy three or four different clients and in the speedy discharge of the cargo documentation and procedure have been kept to a minimum to enable this to be done. The port of Sydney has been congested for years and years and it is essentially upon the stevedores to speedily discharge cargo. 20 30

Q. Is there a positive instruction giving a watchman such as Mr. Bowdler an instruction not to look at documents or to look at documents or not to worry about whether he looks at them or not? A. A watchman is not supposed to look at documents, it is not his job.

Q. Is that as Mr. Bowdler says a union matter? A. A demarcation issue would come into it. I would say his job is not to look at documents. 40

Q. You mean you don't employ him to look at documents? A. No.

Q. You do employ tally clerks to look at documents? A. No, the tally-clerk does not look at documents either. The delivery clerk

looks at documents, not the tally clerks neither the tally clerk or the watchman look at documents.

Q. And yet goods are removed from the dead house in the absence of the tally clerk? A. Yes.

Q. So that neither of the persons in the dead house look at the documents? A. That is correct.

10 Q. So that a man could take goods pretending that he had documentation which did not exist? A. That is correct.

Q. You say he should be checked and found out at the gate? A. Yes. I repeat myself. The only final and determining check you can possibly be sure of is the gate.

Q. How does the tally clerk know what he has got to tally? A. He doesn't know what it is. When the carrier takes the tally on
20 ticket back to the delivery office the delivery clerk then checks that tally on ticket with the original bill of lading and his delivery book. He then issues a gate pass which is countersigned by the carrier agreeing that the gate pass is stating the goods on his waggon.

Q. That is after he has put the goods on the waggon? A. Yes.

Q. Then he gets this tally on slip? A. Yes.

30 Q. Which is made out by the delivery clerk? A. No, the tally on sheet is made out by the tally on clerk in the shed and the carrier takes the particular tally on ticket to the delivery clerk in the delivery office who then examines the tally on ticket as against the bill of lading and his delivery book and issues a gate pass which purports to show the number of cases and marks on the carrier's waggon. The carrier then signs the gate pass indicating he
40 agrees that the goods on his waggon are in fact as stated on the gate pass.

MR. PARKER: Q. Do you agree that in the absence of documents the tally on clerk to prepare the tally on ticket would have to look at the cargo? A. You look at the cargo being tallied on to the waggon, yes.

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Examination (continued)

Q. In fact the absence of documents is expected to force him to prepare a tally on ticket? A. That is so, it forces him to physically tally on or count the stuff that has been put on the waggon.

Q. From your records how many watchmen were on duty at the relevant time on 14th May 1970? A. There were three shed watchmen, one supervising watchman and one storeman, who was classed as a watchman. 10

CROSS-EXAMINATION

Cross-Examination

MR. GLEESON: Q. Under the system that was employed by your company on the occasion in question or in circumstances such as those in question should a tally on clerk have been physically observing the loading on to the truck of the cartons of razor blades in question? A. It depends on the circumstances. There are occasions when due to volume of work you may have ten waggons arrive 20 at the same time and there are only five tally on clerks and they possibly cannot deal with two waggons at once. If the cargo is homogenous what they do is tally on cargo which is not homogenous and the stuff that is homogenous they tall on after the material is loaded on the waggon.

Q. Does it come to this then, that so far as the system is concerned whether or not a tally on clerk will be present at the 30 physical loading of the goods on the waggon may depend on circumstances? A. Yes.

Q. And those circumstances would include whether or not the wharf is congested? A. Yes.

Q. Whether or not the goods are of a suitable kind? A. Yes.

Q. Is it part of the system that one of the circumstances that might be supposed to govern the matter of whether a tally on clerk actually watches goods being loaded is whether 40 or not it is a sunny day? A. I cannot answer that question I am sorry.

Q. It would not be part of the system would it that the tally on clerk could refuse reasonably to watch goods being loaded on the basis he would rather sit in the sun? A. No.

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Cross-Examination (continued)

Q. You said that the final and determining safety factor is the man at the gate? A. Yes.

Q. Of course it is entirely possible I suppose that if a criminal comes on to the wharf and loads stolen goods on to a truck and is seeking to get off the wharf he will drive through the gate at a high speed? A. That has been done, yes.

10 Q. Threatening the life of the man at the gate if he gets in his way? A. Yes, I understand so.

Q. So part of the system is to ensure that a person does not get goods that do not belong to him on his truck in the first place? A. That is the intention of any system.

Q. That is the intention of your system? A. Yes.

20 Q. And the fact that on a particular occasion an unauthorised person gets goods that do not belong to him on to his truck suggests to you does it not that either there was something wrong with the system or the system was not being properly observed? A. I said before no matter what system you put in of documentation there are always opportunities for an unauthorised person to get goods on the truck depending on the volume of tonnage in the shed and the number of men available.

30 Q. All I am seeking to do is to examine your suggestion that the final and determining factor is the man at the gate? A. Yes.

Q. You would agree with me would you that if the system is to be a safe system then you have to do all you can to ensure that the situation does not arise that the man at the gate is confronted with a speeding vehicle loaded with stolen goods coming at him? A. Yes. It would minimise that possibility.

40 HIS HONOUR: Q. If the tally clerk sits in the sun as described by Mr. Bowdler, if that happened, how does the tally slip come into existence? A. With homogenous cargo he should have tallied the waggon after it had been completed and loaded, then he writes out the tally on ticket.

Q. That has to be written out by the tally on clerk? A. Yes.

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9th and 10th April 1975

Second-named Defendant's evidence

Percival Albert Clifton Dermond

Cross-Examination (continued)

Q. Do you mean it can be taken over to him and he can do it in the sun? A. No because on our system he has to walk across to the waggon and put the marks and the number of packages from the particular waggon on his tally on ticket. That is the reason why we do it this way. He is forced to physically go across to the waggon whilst it is being loaded or after it has been loaded and mark down on the ticket the number of packages and marks on the packages which have been loaded on the waggon by the carrier. 10

Q. Is there any tally on slip in this case? A. A tally on slip from whom?

Q. So far as this particular consignment? A. No there is not.

Q. That has not been found? A. Apparently it was not tallied on to the waggon.

MR. GLEESON: Q. There was no tally on slip? A. To the best of my knowledge, no. 20

Q. So far as you are aware what happened was that a truck loaded with the goods in question drove at high speed through the gate and the gatekeeper had to get out of the way. A. That is my understanding yes.

Q. When the goods are being loaded on to the carrier's vehicle does the carrier get any assistance from the employees of the stevedore? A. No.

Q. He does it on his own? A. Yes. 30

Q. No doubt he will do it in the sight of the watchman? A. Not necessarily. He will do it in the sight of the tally clerk.

Q. One of these watchmen around the place would normally be in a position to see somebody loading 33 cartons of razor blades of this dimension on a truck? A. There were three watchmen employed in the shed and there are about 10 or 12 doors. They have a roving commission. They wander around the shed looking at goods which may be pilfered in the shed. 40

Q. Part of their roving commission is to keep an eye out for suspicious circumstances? A. I would presume so, yes.

Q. The watchmen are there to guard against

theft? A. Yes.

Q. That is their particular function, to watch out for goods, people who might be bent on stealing goods? A. I would say pilfering goods more than stealing goods.

Q. They are supposed to watch over the goods? A. Yes.

Q. If a watchman sees goods being loaded on to a truck in the absence of a tally clerk
10 he would not be fulfilling his duties as a watchman if he simply turned a blind eye to that fact, would he? A. Again it depends on circumstances. There may be 12 carriers loading and only four tally clerks employed. That means there is one tally clerk to three waggons. It is possible a watchman may see a carrier loading on to a waggon or two carriers or three carriers loading waggons and a clerk in close proximity. He realises in those
20 circumstances it is usual for the clerk to do the three waggons. He usually stands at the waggon where there is no homogenous cargo being loaded. If two waggons have more homogenous cargo he deals with it after the loading has been completed.

Q. Would you agree with me that a watchman is supposed to be in the nature of a security officer? A. Yes.

Q. And it is part of his duty if he observes
30 any suspicious circumstances to make investigations about it? A. Yes.

Q. With a view to preventing goods being stolen if that can be prevented? A. Yes.

MR. SHELLER: Q. You heard yesterday Mr.Bowdler describing the three tally clerks sitting in the sun? A. Yes.

Q. And you have told his Honour in this case no tally ticket was ever prepared in respect of the removal of the 33 cartons? A. To my
40 knowledge that is so.

Q. There could be no doubt could there that the persons operating on behalf of your company for the discharge of goods from that wharf were negligent in this instance? A. A tally ticket was not written out.

Q. In the circumstances as you know it?

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Second-named Defendant's evidence

Percival Albert Clifton Dermond

Cross-Examination (continued)

Walter Phelps Glover

Examination

(Objected to by Mr. Parker; question withdrawn)

(Witness retired and excused)

WALTER PHELPS GLOVER
Sworn and examined:

MR. PARKER: Q. Would you give the Court your full name? A. Walter Phelps Glover.

Q. Your residential address? A. 7/57 Parkview Avenue, Five Dock.

Q. Where are you presently employed? A. Sydney Australia Port. 10

Q. I want to ask you some questions about an incident that occurred in May of 1970 in relation to discharge of the New York Star. You were then were you not a delivery clerk doing duties as delivery clerk at No.2 Glebe Island? A. That is correct.

Q. Have a look at exhibit A. Do you see that that particular bill of lading refers to a consignment of razor blades? A. Yes. 20

Q. Part of your duties as delivery clerk are to receive the bill of lading are they not and other documents from the consignee or his carrier? A. Yes.

Q. Do you recall in May 1970 being shown that document? A. Yes.

Q. Was that somebody apparently acting on behalf of the plaintiff in this case? A. It was the agent for the owners.

Q. Prior to that request being made to you had anything untoward occurred that you can remember? A. All I know of the matter is this, that this bill was presented and I said to the supervising watchman, "These razor blades can be delivered now", he said, "they have gone". That is the first I knew of the incident. 30

Q. Prior to that time was there anything untoward in the routine of the wharf that was brought to your notice? A. No. 40

HIS HONOUR: Q. Where did you have this conversation with the supervising watchman?

A. Behind the desk in the delivery office.

Q. He was in front of the desk? A. He was in the office.

Q. How did he come to be there? A. He was about his business, I don't know for certain going back that far, but he was there.

Q. Did the watchmen come into your office occasionally? A. Yes.

10 Q. He just happened to be there when this came in? A. To the best of my recollection yes.

MR. PARKER: Q. No gate pass was issued in relation to this cargo by you? A. There was no sheet tally and no gate pass issued.

Q. What is the size of the ship the New York Star? A. I couldn't tell you now.

Q. Can you describe the general activity of discharge and so forth on the wharf on
20 that day. Was it busy? - -

HIS HONOUR: Q. At this time. A. To the best of my recollection yes.

CROSS-EXAMINATION

MR. GLEESON: Q. Were there tally clerks sitting around in the sun? A. I was in the office.

Q. If you were in the office you would not be in a very good position to observe the general state of activity on the wharf? A. I left the office every so often for various
30 reasons.

Q. When you left the office would the fact the tally clerks were sitting in the sun indicate it was not a very busy day? A. I honestly don't know. I don't know about the tally clerks sitting in the sun even.

MR. SHELLER: No questions. (Witness retired)

(Luncheon adjournment)

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(continued)

MR. PARKER: Your Honour, I seek to tender a statement made by a gateman employed by Overseas Shipping. I understand the man is deceased and my friends do not object to the statement going in.

MR. SHELLER: I understand this deceased was an employee neither of Joint Cargo Services nor Port Jackson Stevedoring.

MR. PARKER: I think that is made clear. I would seek to have that noted. 10

(Handwritten statement and typed copy admitted and marked Ex.5)

(Wage records relating to employees of Port Jackson Stevedoring Pty. Ltd. regarding New York Star tendered - tender withdrawn)

(Document previously m.f.i. B tendered without objection and marked Ex.6)

(Case for second-named defendant closed) 20

(No case in reply)

(Counsel addressed)

(Further hearing adjourned to 10 a.m. on Friday, 11th April, 1975)

No. 3

JUDGMENT OF HIS HONOUR
MR. JUSTICE SHEPPARD
14th July 1975

In the Supreme Court of New South Wales

No. 3
Judgment of His Honour Mr. Justice Sheppard
14th July 1975

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION
COMMERCIAL LIST
No. 5033 of 1971

CORAM: SHEPPARD, J.

14th July, 1975

10 SALMOND & SPRAGGON (AUSTRALIA) PTY.LIMITED
v.
JOINT CARGO SERVICES PTY. LIMITED & ANOR

JUDGMENT

HIS HONOUR: This is an action by the plaintiff to recover from the defendants damages for the loss of certain goods, namely razor blades, lying in a shed upon a wharf known as No.2 Glebe Island, Sydney. The defendants are sued for breaches of various obligations said 20 to have been owed by them as bailees of the goods. The evidence establishes that the goods were stolen from the wharf, the thief tricking the watchman and possibly the tally-on clerk on duty into letting him have possession of them. The goods had been carried to Sydney from St.John, New Brunswick in a vessel owned by the Blue Star Line Limited known as the New York Star. The vessel arrived in Sydney and commenced to discharge on 10th May, 1970. The goods were 30 discharged on or about 12th May, 1970 and a day or so later lost in the way I have described.

The goods were shipped pursuant to a bill of lading in which the shipper was the Schick Safety Razor Company of Canada and the consignee was the plaintiff. Thirty seven cartons were shipped, thirty three of which were stolen. It is agreed by the parties that their value was $14,684.98 and this is the amount which the plaintiff is entitled to recover if it is 40 successful in the action.

The bill of lading began with the following words :-

"RECEIVED from the Shipper hereinafter named, the goods or packages said to contain goods hereinafter mentioned, in apparent good order and condition, unless otherwise indicated in this bill of lading to be transported subject to all the terms of this bill of lading with liberty to proceed via any port or ports within the scope of the voyage described herein, to the port of discharge or so near thereto as the ship can always safely get and leave, always afloat at all stages and conditions of water and weather, and there to be delivered or trans-shipped on payment of the charges thereon. If the goods in whole or in part are shut out from the ship named herein for any cause, the Carrier shall have liberty to forward them under the terms of this bill of lading. 10

It is agreed that the custody and carriage of the goods are subject to the following terms on the face and back hereof which shall govern the relations, whatsoever they may be, between the shipper, consignee, and the Carrier, Master and ship in every contingency, wheresoever and whensoever occurring, and also in the event of deviation, or of unseaworthiness of the ship at the time of loading or inception of the voyage or subsequently and none of the terms of this bill of lading shall be deemed to have been waived by the Carrier unless by express waiver signed by a duly authorized agent of the Carrier." 20 30

There followed a number of conditions of which it is material to set out the following :-

"1. This bill of lading shall have effect subject to the provisions of the Water Carriage of Goods Act, 1938, enacted by the Parliament of the Dominion of Canada, and the said Act shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities under the said Act. If any term of this bill of lading is repugnant to the said Act to any extent, such terms be void to that extent, but no further. Nothing herein contained shall prevent the carrier from claiming in the courts of any country the benefit of, or derogate in any way from any statutory protection or limitation 40 50

of liability afforded to shipowner or carrier by laws of such country or by the laws of the country in which the goods were shipped or discharged.

2. It is expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any
10
liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption
20
limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be
30
deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading.

5. The Carrier's responsibility in respect of the goods as a carrier shall not attach
40
until the goods are actually loaded for transportation upon the ship and shall terminate without notice as soon as the goods leave the ship's tackle at the Port of Discharge from Ship or other place where the Carrier is authorised to make delivery or end its responsibility. Any responsibility of the Carrier in respect of the goods attaching prior to such loading, or continuing after leaving the ship's tackles
50
as aforesaid, shall not exceed that of an ordinary bailee, and, in particular, the Carrier shall not be liable for loss or damage to the goods due to flood, fire, as provided elsewhere in this bill of lading;

falling or collapse of wharf, pier or warehouse; robbery, theft or pilferage; strikes, lockouts or stoppage or restraint of labor from whatever cause, whether partial or general; any of the risks or causes mentioned in paragraphs (a) (c) to (i) inclusive, and (k) to (p), inclusive, of subdivision 2 of section 4 of the Carriage of Goods by Sea Act of the United States; or any risks or causes whatsoever, not included in the foregoing, and whether like or unlike those hereinabove mentioned, where the loss or damage is not due to the fault or neglect of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any non-delivery or mis-delivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier.

8. Delivery of the goods shall be taken by the consignee or holder of the Bill of Lading from the vessel's rail immediately the vessel is ready to discharge, berthed or not berthed, and continuously as fast as vessel can deliver notwithstanding any custom of the port to the contrary. The Carrier shall be at liberty to discharge continuously day and night, Sundays and holidays included, all extra expenses to be for account of the Consignee or Receiver of the goods notwithstanding any custom of the port to the contrary. If the Consignee or holder of the Bill of Lading does not for any reason take delivery as provided herein they shall be jointly and severally liable to pay the vessel on demand demurrage at the rate of one shilling and sixpence sterling per gross register ton per day or portion of a day during the delay so caused; such demurrage shall be paid in cash day by day to the Carrier, the Master or Agents if the Consignee or holder of the Bill of Lading requires delivery before or after usual hours he shall pay any extra expense incurred in consequence. Delivery ex ship's rail shallconstitute due delivery of the good's (sic) described herein and the carrier's liability shall cease at that point notwithstanding consignee receiving delivery at some point removed from the ship's side and custom of the port being to the contrary. The Carrier and his Agents shall have the right of nominating the Berth

or Berths for loading and discharging at all ports and places whatsoever, any custom to the contrary notwithstanding. The Carrier shall not be required to give any notification of disposition or arrival of the goods.

17. In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear."

On its reverse side the bill provided that in accepting it the shipper, consignee and the owners of the goods agreed to be bound by all of its conditions, exceptions and provisions whether written, printed or stamped on the front or back of it. It concluded with the following words :-

"IN WITNESS whereof the Master, Purser or duly authorised Agent of the Carrier hath affirmed to Three Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void. As required by the Carrier or his Agents, one of the Bills of Lading must be given up, fully endorsed, in exchange for release or delivery order."

The first defendant was engaged by the shipping company as its agent in Sydney and the second defendant was retained by the first defendant on behalf of the shipping company to act as stevedore in connection with the discharge of the vessel and the handing over of cargo to consignees. On 11th May, 1970 the bill of lading was endorsed by the first defendant with an instruction to deliver the goods mentioned therein in exchange for the bill of lading.

The second defendant did not submit that the goods were not, at all relevant times, in its possession. It was in occupation of the shed upon the wharf to which I have referred. Within that shed there was a separate section known as "the dead house". This was a section designed to provide greater security than was provided in other parts of the shed or on the wharf itself. In it were stored cartons of goods

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which had already been pilfered and also goods which were thought to be greater theft risks than others. Such goods included cartons of razor blades. In charge of the dead house at the relevant time was a supervising watchman named Bowdler. There were three other watchmen employed in the area, although not at all times in the dead house. On the wharf was a delivery office in which there was a delivery clerk. The delivery office was not in sight of anyone in the dead house. Also employed on the wharf were tally-on clerks. 10

The duties of the tally-on clerks were to make tallies of the goods loaded on to the vehicles of carriers who came to collect goods on behalf of consignees. These duties could be performed either as the goods were loaded or after they had been loaded, and were performed by the making out of a tally slip which contained a description by reference to shipping marks on each carton or case of goods and tallied up the number of cases or cartons which had been loaded. The system in force then provided for the carrier to take the shipping documents and the tally slip to the delivery clerk who would, if satisfied that the documents were in order, issue a gate pass to enable the carrier to remove the goods which were the subject both of the shipping documents which he had brought with him to the wharf and the tally slip. There were two gates by which a carrier could leave the wharf and at each was a gatekeeper not employed by either defendant. It was his duty to look at the gate pass and make sure that the goods being removed were being removed with the authority of the stevedore, that is he was supposed to check the goods on the vehicle with what was written on the gate pass. Evidence of the system which I have described was given by Mr. Dermond who is the secretary of the second defendant. I accept his evidence. 20 30 40

On the day of the theft the thief approached Mr. Bowdler and said that he had come for the razor blades. Mr. Bowdler asked him whether he had his papers and he said that he had. He had papers in his hand. Mr. Bowdler's evidence proceeds as follows:- 50

> "I said, 'Would you go in the delivery office and check up with the head clerk,

come back here and get the watchman to take the numbers of the ones you are going to take, the cartons you are going to take and also get a tally into the dead house.'

Q. What did he do then? A. I watched him go out of the door of the wharf out to the delivery office and naturally I thought he had gone around to the delivery office and when he came back I said, "All right, get a tally and take the numbers of the ones that are not pillaged which you are taking.' Naturally he didn't have to show me anything. All I had to say, which I have always done up to date and I still do it is, 'Have you been to the delivery office?'. I said to him, 'There are three Tallies sitting over there in the sun. Get one of them to come over here and check the numbers.'

Q. Did he go over? A. He went over to the Tally and I seen him go to the Tally clerk. I seen the Tally clerk nod his head. He could have said, 'What's it like sitting in the sun?' or something like that.

Q. Having seen the Tally clerk nod his head this man came back to you then? A. Then he came back and started to wheel the big cartons out.

Q. What did he do when they wheeled them out? A. They were loading on to a truck, two of them, two men.

Q. Did you observe all the thirty-three cartons being wheeled out of the dead house? A. Yes. I interrupted again and I said, 'What's your Tally doing? He should be checking numbers. He should be over here taking the numbers.' I have often had an argument when Tallies would not come to the dead house. I cannot get them by the hand and drag them into the dead house."

Mr. Bowdler said that when the thief left to go, as he thought, to the delivery clerk, he came out of the wharf shed and disappeared from his view. He then came into view again and it was then that Mr. Bowdler saw him speak to one or other of the tally-on clerks. After he had spoken to the clerk he returned to the

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dead house and with the other man commenced to load the thirty-three cartons on to the truck. Mr. Bowdler was present whilst that took place in the dead house. Apparently he did not speak to the thief or his assistant further. He did not see the truck drive away. Some time later he looked over towards the door and the truck had gone.

In fact the thief did not have a tally slip made out, and had not gone to the delivery office. He left the wharf and drove through one of the exit gates at high speed giving the gatekeeper no opportunity to shut the gate in front of him. The gatekeeper secured the numberof the vehicle but I was told by counsel in the course of argument that the number plates were apparently false. 10

It is to be observed that no employee of the first defendant was involved in the incident which occurred. Each was an employee of the second defendant and it was its system which was in force. The first defendant has submitted that it has not been established that it was ever in possession of the goods. It relied upon a decision of the Victorian Supreme Court, Duncan Furness & Co. v. R.S.Couche & Co. (1922) V.L.R. 660. Although I think this case is helpful in drawing one's attention to the matters to be considered in resolving the question, it must ultimately be a question of fact as to whether the first defendant had possession of the goods or not. 20 30

The matters relied on by the plaintiff to counter this submission are that it was the first defendant which upon the bill of lading authorised the delivery of the goods; it was the first defendant who arranged for the availability of the wharf and the shed in which the goods were stored; and that the first defendant, by its marine superintendent, Mr. Harris, from time to time exercised some general supervision over the unloading of the vessel and of the goods upon the wharf. Mr. Harris conceded in his evidence that he was aware of the second defendant's practice in relation to the holding and delivery of goods held on behalf of consignees, and that if he had noticed anything untoward about that practice or the way in which it was 40 50

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being carried out he would have brought it to the attention of his superiors. These matters were said to give the first defendant a form of general control over the goods sufficient to constitute it a bailee. Having considered these matters I have reached the conclusion that the first defendant had not possession of the goods. It has not been sued otherwise than as a bailee and that being so there must be judgment for the first defendant.

Before passing to consider the question of the liability, if any, of the second defendant I should mention another basis upon which in my opinion the first defendant is entitled to succeed. This is not a case where it is relevant to consider whether either defendant has discharged an onus of establishing that it took reasonable care of the goods. What happened to the goods is precisely known. To the extent that there was any failure to take care, it was not due to any negligence of the first defendant nor of any of its employees. Neither the first defendant nor any of its employees was guilty of any failure to take reasonable care of the goods. No servant of the first defendant had any part in the delivery of the goods nor could it be said that any such person participated in any mis-delivery which took place. Despite some argument to the contrary, both on behalf of the plaintiff and the second defendant I cannot find any basis in the evidence for holding that the second defendant was the agent of the first defendant. If, contrary to the finding about possession which I have made, the first defendant, as well as the second defendant had possession, the possession was one which the two defendants had jointly. On this basis also, it is my opinion that the first defendant is entitled to judgment.

The next matter to which I turn is the question of whether or not the second defendant, having possession of the goods in the circumstances mentioned by me, took due care of them. I am clearly of opinion that it did not. I have reached this conclusion both because I think that the system which was in force was not one which provided for the due care of the goods and also because those entrusted with the carrying out of the system did not carry it out properly. As regards this latter matter it seems to me that the tally clerk who

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(continued)

was spoken to by the thief failed in his duty when he continued to sit in the sun and did not come over to the dead house with the thief. It may be in busy times there would need to be a selection of which loading operation a particular tally clerk would watch, but there is no basis for saying, despite some general evidence to the contrary given on behalf of the second defendant, that this was a busy time. The tally clerk was under a duty to go over and check the goods on to the truck, even if his slip was written out after the goods were loaded. His failure to do so was the event which enabled the thief to leave the wharf without going to the delivery office. Furthermore, the second defendant's system did not allow for the watchman, Mr. Bowdler, to demand the production of documents authorising a person such as the thief to remove goods from the dead house. It must be remembered that the goods were in the dead house because it was thought they were more attractive to thieves and therefore more likely to be stolen than other goods. Special care was therefore being taken to protect them. Yet a thief was able, without the production of any documents, to give an oral assurance that his documents were in order and that he had been to the delivery office without any check of what he said being made. It was obvious to Mr. Bowdler that the tally-on clerk was not doing his job. Even then the system did not expect of Mr. Bowdler that he would check documents. It is perfectly true that the way in which the vehicle was driven through the gate indicates that the theft was an extremely deliberate one, well planned and carried through with persistence; but what enabled it to be carried through in the way that it was, was the absence of a system which required the production of documents of title to the person in charge of the dead house, the very place which was thought to be the appropriate place to house goods of the kind in question. Failure to take reasonable care of the goods is established both by there being in force an unsatisfactory system and by the negligent carrying out by the defendant's employees of such system as was in force. If there were no more to the case, the plaintiff would be entitled to succeed against the second defendant, but there is a great deal more. In due course I will need to come to consider the operation of the clauses

in the bill of lading restricting the second defendant's liability in the circumstances in question. When I do so it will be appropriate to consider whether, subject to any operation which the conditions have, the second defendant was in breach of other obligations owed by it to the plaintiff in relation to the delivery of the goods. I have made the findings I have in relation to failure to take reasonable care of the goods in order to show that I have rejected submissions made to the contrary by counsel for the second defendant. If there were no matters to be considered in relation to the second defendant's right to rely upon the clauses in the bill of lading and, if it is so entitled, the extent of the operation of those clauses in the circumstances, the plaintiff would clearly be entitled to judgment against the second defendant.

I propose now to deal in turn with the following questions :-

(1) Is the second defendant entitled under any circumstances to rely upon the provisions of the bill of lading, bearing in mind that it was a contract made between the shipper of the goods and the carrier?

(2) If so, is it so entitled in this case, bearing in mind that the goods had been discharged from the vessel and were in the wharf shed when they were stolen?

(3) If so, are the provisions of the bill of lading such as to exempt the second defendant from liability in respect of the loss of these goods, they having been given up otherwise than in exchange for a copy of the bill of lading?

I deal with these questions as follows:-

(1) The bill of lading in the present case differs from those considered by the House of Lords in Midland Silicones Ltd. v. Scruttons Ltd. (1962) A.C.446 and by the High Court in Wilson v. Darling Island Stevedoring and Lighterage Co. Limited 95 C.L.R. 43. It contains in condition 2 (set about above) a clause which has come to be known as Himalaya clause. It derived its name from the ship the master of which was sued in Adler v. Dickson (1955) 1 Q.B. 158. Although there

were provisions in the bills of lading in the first two of the cases to which I have referred, and in the ticket in the third case, purporting to exempt the carrier's servants, agents and independent contractors from liability in certain circumstances, these were held not to be effective to achieve their purpose. In Midland Silicones Ltd. v. Scruttons Ltd. (supra) Lord Reid said at p.474 :-

> "I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice and (fourthly) that any difficulties about consideration moving from the stevedore were overcome. And then to affect the consignee it would be necessary to show that the provisions of the Bills of Lading Act 1855 apply." 10 20 30

In New South Wales the Act is the Usury, Bills of Lading, and Written Memoranda Act 1902 (s.5).

That dictum was obiter. But despite the cautious way in which his Lordship spoke ("I can see a possibility of success"), what he said commanded great respect, not only because he was a member of the House of Lords, but also because of his very great eminence in the law. Nevertheless there are in the passage I have cited a number of things which it might be thought would need elaboration if the ambit and scope of what his Lordship had in mind were to be precisely known. 40

In 1971 the New Zealand Supreme Court (Beattie J.) had to consider a clause, in terms not distinguishable from that in the bill of lading here, in an action by a consignee of goods against stevedores who had negligently damaged its goods whilst 50

unloading them. The case, Satterthwaite & Co. Limited v. New Zealand Shipping Co.Limited (The "Eurymedon") (1971) 2 Ll.L.R.399, went on appeal to the Court of Appeal of New Zealand, which reversed the decision of Beattie J., and then to the Privy Council which, by majority, restored it; (1975) A.C. 154. Lord Reid's dictum was, with one qualification, accepted by each court as correctly stating the law. The one qualification is that it would seem that the better view is that the Bill of Lading Act 1855 and its counterparts are not appropriate to be relied upon, but that the consignee is affected by an implied contract arising from the fact of his taking delivery of the goods; cf Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co.Limited (1924) 1 K.B. 575 at p.596; (1975) A.C. at p.168.

The decision of the Privy Council is binding upon this court although its decision was given in respect of an appeal from a court other than an Australian court; Morris v. A.S. & A. Bank Limited 97 C.L.R. 624 at p. 630.

Counsel for the first defendant, who, of necessity, argued each point, submitted that the effect of the judgment of the Privy Council in Satterthwaite's case was that, in the circumstances presently existing, it was open to the first and second defendant to take the benefit of those provisions of the bill of lading which, upon its true construction, purported to exempt them and others acting for the carrier from liability in a case such as this. I accept this submission. Clearly Lord Reid's first and second conditions are fulfilled. There is no distinction between the present case and Satterthwaite's case so that his fourth condition in relation to consideration, as elaborated upon and explained by the Privy Council, is also met, as in that relating to the consignee being affected; not, however, by reason of any legislation, but by the implication of a contract under the general law. Lord Reid's third condition namely, "the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice", was submitted not to have been fulfilled. Evidence was given in relation to this matter by Mr. Dermond. He was, as I have said, the secretary of the company. He was

asked whether he was familiar with the bill of lading in the present case. He said, "Generally speaking yes. I have no intimate contact with bills of lading ordinarily. I know of their existence and this form which they take". He said he was familiar with the sort of bill of lading which had been used by the Blue Star Line prior to 1970 and agreed that he was particularly familiar with the clause in the bill of lading which purported to give some exemption to independent contractors. That is the entirety of the evidence upon which the second defendant relies to show that the carrier had authority from the second defendant to contract as its agent when it entered into the bill of lading. I do not myself feel able to find that such authority has been established but Lord Reid referred also to ratification. Beattie J. in The "Eurymedon" (supra) discussed this question at some length. At pp.404-5 his Honour said :-

> " The bill of lading passed through the defendant as at July 31, that is, prior to it undertaking the loading operation. Accordingly, it seems apparent that the defendant was aware (before it carried out the stevedoring work) of the terms of the bill of lading and, with that knowledge, there was implied ratification. In any event, it appears to me that because the defendant is relying on the terms of a contract, that per se can be regarded as a proper act of ratification."

This was not a matter which was argued to any extent before the Privy Council; (1975) A.C.pp.159-163. Nevertheless it seems to me that what his Honour was saying, putting the defendant's position at its very lowest, was that its action in relying upon the clause in the proceedings was a sufficient or proper act of ratification bearing in mind its prior knowledge of the terms. I have not myself considered whether this is a correct view of the law or not. I think I should take what Beattie J. said as being approved, notwithstanding the absence of argument, at least by implication by the Privy Council.

In connection with this matter I should mention that there was tendered by the

plaintiff a document which accompanied a letter supplying particulars written by the second defendant's solicitors, which document was headed "Basic Terms and Conditions for Stevedoring at Sydney". The document contained a number of provisions which indicated the basis upon which the defendant would carry out stevedoring work for owners of ships in the Port of Sydney. There were some twenty
10 clauses together with a rate schedule. Clause 14 was headed "Limitation of Stevedores Liability" and was in the following terms :-

> "When loss, damage or injury is occasioned to any cargo vessel or its crew by reason of negligence for which a contracting Stevedore is liable, the liability thereupon of the contracting Stevedore is limited to the sum of One hundred thousand pounds (£100,000) in all in respect of
> 20 any one incident and the Shipowner shall indemnify such Stevedore against all liability beyond the said sum, but notwithstanding the foregoing it is expressly agreed that the Stevedore shall be under no liability for any such loss, damage or injury arising from the failure or breakage of plant or gear not provided by him but provided by the Shipowner for his use in which case the Shipowner shall
> 30 fully indemnify him against all liability."

It was submitted by the plaintiff that such a clause ran counter to the notion that the liability of the stevedore was, in the present case, limited in the way contended. It was said that if the second defendant had considered itself protected by the limitations as to liability contained in the commonly used form of bill of lading there would have been a reference made in condition 14 to that fact,
40 not by setting out the clauses but by a statement that in cases where the goods of consignees were being unloaded, stored or delivered the second defendant would rely upon the terms of the bill of lading in common use and limit its liability to a greater extent than is provided for in clause 14. I reject this argument because I think that two different things are involved. The document relied upon sets out conditions which provide for the terms
50 upon which the second defendant will carry out stevedoring work for shipping companies. No question of any contract between stevedores and consignors or consignees of goods is involved.

The fact that there is a limitation of liability clause is not inconsistent with there being limitations of liability in contracts deemed to have been made with consignors and consignees, and the fact that there is reference to £100,000 in the clause is explicable on the basis that there may be many people to whom the stevedore will incur liability and who are not in any contractual relationship whatever with it. 10

For the above reasons I answer the first question posed above in the affirmative.

(2) Counsel for the plaintiff sought to distinguish Satterthwaite case from the present upon the basis that in that case the goods were damaged whilst being unloaded, whereas in this case they were lost after discharge and after they had been stored in a shed upon the wharf for at least twenty-four hours. Reference was made to the provisions of clauses 5 and 8 of the bill of lading in relation to the carrier's responsibility and delivery of the goods. Clause 5 provides that the carrier's responsibility in respect of the goods as a carrier shall not attach until the goods are actually loaded and shall terminate without notice as soon as the goods leave the ship's tackle at the port of discharge. The emphasis is mine. Clause 8 provides that delivery of the goods is to be taken by the consignee or holder of the bill of lading from the vessel's rail immediately the vessel is ready to discharge. Later the clause provides that delivery ex ship's rail shall constitute due delivery of the goods and that the carrier's liability is to cease at that point notwithstanding that the consignee receives delivery at some point removed from the ship's side. These provisions were said to indicate that the bill of lading, once the goods were discharged from the ship's tackle, was exhausted and, accordingly, the defendant could not rely upon its provisions in respect of the loss of the goods in the circumstances existing here. Attention was drawn to the language used by Lord Wilberforce when delivering the majority judgment of the Privy Council in Satterthwaite's case; (1975) A.C. at pp.167-8. His Lordship there said:-

> "The carrier assumes an obligation to transport the goods and to discharge at the port of arrival. The goods are to be

carried and discharged, so the transaction is inherently contractual. It is contemplated that a part of this contract, viz. discharge, may be performed by independent contractors - viz. the appellant. By clause 1 of the bill of lading the shipper agrees to exempt from liability the carrier, his servant and independent contractors in respect of the performance of this contract of carriage. Thus, if the carriage, including the discharge, is wholly carried out by the carrier, he is exempt. If part is carried out by him, and part by his servants, he and they are exempt. If part is carried out by him and part by an independent contractor, he and the independent contractor are exempt. The exemption is designed to cover the whole carriage from loading to discharge, by whomsoever it is performed: the performance attracts the exemption or immunity in favour of whoever the performer turns out to be. There is possibly more than one way of analysing this business transaction into the necessary components; that which their Lordships would accept is to say that the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shipper and the appellant, made through the carrier as agent. This became a full contract when the appellant performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading."

What the plaintiff draws attention to in that passage is his Lordship's repeated use of the expression "discharge", and particularly the words, "The exemption is designed to cover the whole carriage from loading to discharge, by whomsoever it is performed". It was submitted that these words were carefully chosen so as to distinguish Satterthwaite's case from a case where the goods were damaged or lost after discharge. The submission uses the word "discharge" in the sense of the goods landing upon the wharf. It is not clear to me that his Lordship intended the expression to have this limited meaning. It is true that he was

concerned with a case where the goods had been damaged during unloading, but I would myself have thought that if he had intended to draw this distinction, whether for reasons associated with the true construction of the bill of lading or otherwise, he would have been more explicit. What I think has to be done, as counsel for the first defendant, whose submissions counsel for the second defendant adopted, submitted, is to construe the bill of lading bearing in mind that by reason of the considerations mentioned when the first question was dealt with, the independent contractors of the carrier are entitled to take advantage of the limitations of liability contained in the bill of lading if, upon their true construction, they are applicable to the situation in question.

I do not consider that the bill of lading was exhausted when the goods left the ship's tackle. In reaching this conclusion I have not overlooked the provisions of the bill of lading which are relied upon but reference must also be made to other provisions. Clause 5, after providing, as I have already indicated, that the carrier's responsibility in respect of the goods as a carrier shall terminate as soon as the goods leave the ship's tackle goes on to provide that any responsibility of the carrier in respect of the goods continuing after leaving the ship's tackle shall not exceed that of an ordinary bailee. Subject to the matters that follow it is still to have some responsibility. This is a matter provided for in the bill of lading, which is plainly not exhausted in this respect. Clause 8 envisages, notwithstanding that delivery ex ship's rail is to constitute due delivery, that delivery may be taken at a place removed from the ship's rail. Moreover the clause must be read in conjunction with clause 5 to which I have already referred. To the extent that there is any ambiguity the clauses would be read contra proferentem the carrier and others relying upon the bill of lading. Such a reading would plainly require it to be still on foot if only for the purpose of protecting the consignee by permitting delivery of the goods only in exchange for a copy of the bill of lading. I refer to the final words of the bill set out on page 4 of this judgment and to Sze Hai Tong Bank Limited v. Rambler Cycle Co.Ltd. (1959)

A.C.576 at p.586. Moreover the bill of lading must be construed against the known commercial background. The fact is that consignees rarely take delivery at the ship's rail or on the wharf but more often collect their goods in the way that the goods here were intended to be collected. It is well known that the carrier must employ agents to stack goods on the wharf or in a shed and hold them pending delivery to the consignee which must be effected in exchange for a copy of the bill of lading. In my opinion it would be an erroneous construction of the bill of lading to read it so as to entitle the carrier simply to dump goods upon a wharf and leave them unprotected and at the mercy both of the elements and thieves.

The plaintiff placed reliance upon statements in the judgment of Asprey J.A., in whose judgment Walsh J.A. agreed, in York Products Pty. Limited v. Gilchrist Watt & Sanderson Pty. Limited (1968) 3 N.S.W.R. 551. That case, which had been tried in the District Court, went on appeal to the Court of Appeal here and then to the Privy Council. A number of questions were involved but the passages relied upon by the plaintiff were written in connection with a submission by the defendant that it, although a stevedore in a position not different from the stevedore here, did not have possession of the goods, possession of them remaining with the ship. Before I refer to the passages relied upon it is convenient to mention a further decision upon which the plaintiff relies namely, Keith Bray Pty. Limited v. Hamburg Amerikanische (11th September, 1970, unreported). In that case a ship had, pursuant to a bill of lading, unloaded a case of machinery on to a wharf in Sydney. The case was stacked on the wharf awaiting delivery to the consignee. When the ship departed she dragged the case off the wharf with her lines and the machinery was very badly damaged. In an action by the consignee against the ship reliance was placed by it upon exception clauses in the bill of lading. Macfarlan J., in rejecting this argument, relied upon what Asprey J.A. had said in the York Products case. Macfarlan J. said "....it seems to me that on the authority of the Court of Appeal's decision I am obliged to hold that the bailment of the ship ceased when the goods were discharged on to the wharf and that thereafter the goods remained in the bailment and possession of the

stevedores until the consignee sought and obtained possession." Later he said (p.17):-

> "In the result therefore I am of the opinion that the first defendant in the present case ceased to have any possessory interest or duties in the goods when they were discharged on to the wharf and in particular it was not subject to the continuing obligations of a bailee who had, with authority, sub-bailed the goods to the stevedores. In the circumstances in my opinion I must hold that the contract had been exhausted particularly so far as it imposed any obligations upon the first defendant with respect to possession or custody of the goods. In my opinion I am obliged to hold as I do that the contract being exhausted before the tort in the present case occurred the first defendant had ceased to be under any contractual duties or obligations and there not being any such duties or obligations there was not any circumstance or situation to which the exemption clause was intended to or could apply."

The passage relied upon in the York Products case must be read in the context of the argument (referred to above) with which they were concerned to deal. Moreover there was not in that case reliance upon exception clauses contained in the bill of lading by the defendant. Express reference was made by Asprey J.A. to Wilson v. Darling Island Stevedoring & Lighterage Co. (supra) and to Scruttons Ltd. v. Midland Silicones Ltd. (supra) in the following passage (p.554):-

> "In the present case it is conceded and, I think, quite correctly, that the defendant was not the servant of the ship. It follows that it could not be argued that possession of the goods by the defendant was possession of them by the ship on the ground that the servant's possession is that of the master and, accordingly, some other basis would have to be found to sustain that proposition if it can be sustained at all. In my view, the only conclusion is that the defendant was an independent contractor (Wilson v. Darling Island Stevedoring &

Lighterage Co.Ltd. (1956), 95 C.L.R. 43, per Fullager, J., at p. 70; R.F.Brown & Co.Ltd. v. T. & J. Harrison (1927), 43 T.L.R. 633, at pp.637-8; (1927) All E.R. Rep.195; Scruttons Ltd. v. Midland Silicones Ltd., (1962) 1 All E.R.1; (1962) A.C.446, per Viscount Simonds, at p.466). In that capacity, the defendant was, to borrow a term from Lord Macnaghten in Chartered Bank of India, Australia & China v. British India Steam Navigation Co.Ltd. (1909) A.C.369, see especially at p.373, an intermediary owing duties both to the ship and to the holder of the bill of lading."

On pp.555 and 556 there follow the passages relied upon by Macfarlan J. which must be read, of course, in the context of what else appears on those pages. I do not set them out because of their length. They include references to Chartered Bank of India v. British India Steam Navigation Co.Ltd. (1909) A.C.369, Australasian United Steam Navigation Co.Ltd. v. Hiskens 18 C.L.R. 646 and Keane v. Australian Steam Ships Pty.Ltd. 41 C.L.R. 484, all of which cases were relied upon by the plaintiff here. They are, and they were stated by Asprey J.A. to be, authority for the proposition that it is always open for a ship, by special terms in the bill of lading, to provide that personal delivery to the holder of the bill was not required and that the ship's obligation to deliver the goods can be satisfied by a delivery in some other specified manner. Reference was made to a clause in the bill of lading (similar in effect to part of clause 8 here) which provided that where the goods were discharged from the vessel they should be at their own risk and expense; "such discharge shall constitute complete delivery and performance under this contract and the carrier shall be freed from any further responsibility". His Honour continued, "In this context 'discharged from the vessel' can only mean 'on the wharf free of the ship's tackle'". After further reference to the bill of lading and to two of the cases earlier mentioned his Honour went on to say (p.556) :-

"I would be of the view that, upon the true construction of the bill of lading, personal delivery of the goods to the

holder of the bill of lading was not required of the ship but to find the answer to the question whether the defendant became a bailee of the goods for the plaintiff I do not think that it is necessary to come to a final conclusion one way or the other as to the scope of the ship's contractual obligation of delivery.

I will assume that the provisions of the bill of lading in the present case left untouched the obligation of the ship under the general law to make a personal delivery of the two cases to the holder of the bill of lading. The ship was bailee of the goods for the holder of the bill of lading and, in my opinion, on the assumption which I have made, the ship, in order to perform that obligation effected a sub-bailment of the goods to the defendant, an independent contractor, for the purpose of effecting the delivery on its behalf, I am also of opinion that the defendant, by taking exclusively physical possession of the goods upon terms that it was bound to deliver those goods to the holder of the bill of lading and to no one else when the holder identified itself and was ready to request delivery, became the bailee of the goods for the holder of the bill of lading and that the bailment by the ship was thereby terminated."

The Privy Council, (1970) 2 Ll. L.R.1, held that the defendants were independent contractors, that there was a sub-bailment to them by the shipowners and that, although there was no contractual relationship between the plaintiff and the defendant, the defendant, by voluntarily taking possession of the plaintiff's goods in the circumstances, assumed an obligation, to take due care of them and was liable to the plaintiff for its failure to do so. At p.11 Lord Pearson said :-

"The shipowners have not taken any part in these proceedings, and it is not desirable (if it can be avoided) to give any decision as to the position of the shipowners, as it might prejudice other cases to which they might be

parties. The question raised by this appeal as to the liability of the defendants to the plaintiffs can be decided without deciding questions affecting the shipowners.

....

It is conceivable, that they might remain bailees although protected by this exemption from liability for delay, loss or damage: they might still have the obligation to deliver the goods (if not lost) to the holder of the bill of lading and be liable for refusal to deliver or for mis-delivery. Nevertheless the defendants did take possession of the goods and keep possession of them pending delivery. They were not employees of the shipowners, but independent contractors engaged to do certain work of reception, temporary storage and delivery of the goods. It was not to be expected that the shipowners would themselves look after and deliver the goods at the port of discharge. They would naturally cause these things to be done according to the ordinary and natural course of business, by engaging the defendant to do these things as ship's agents, so that the defendants would have the shipowners' authority to keep and deliver the goods before and after the ship's departure.

On these assumptions - which are the most favourable to the defendants - the bailment to the shipowners continued but there was a sub-bailment from them to the defendants. The defendants as sub-bailees were given and took possession of the goods for the purpose of looking after them and delivering them to the holders of the bill of lading who were the plaintiffs. Thereby the defendants took upon themselves an obligation to the plaintiffs to exercise due care for the safety of the goods, although there was no contractual relation or attornment between the defendants and the plaintiffs."

The question of the ship's position was therefore left open by the Privy Council. But nothing said in their Lordships' judgment affected what Asprey J.A. had said. It is true that he also left the position open but he nevertheless expressed a clear opinion that

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in the York Products case the ship's bailment was at an end when the goods landed upon the wharf. Macfarlan J. in the Bray Case felt obliged to follow his Honour's view, especially as it was agreed in by Walsh J.A. I consider myself similarly bound.

There are in my opinion, however, a number of distinctions to be drawn between the situation which prevailed in the York Products case and the present. Firstly, the various clauses of the bill of lading in that case were not subjected to an analysis for the purpose of reconciling them and placing the various provisions concerning delivery in their context. Certainly there is no mention of a provision such as is set out on p.4 of this judgment relating to delivery in exchange for a copy of the bill of lading. It is pertinent, however, to mention at this point what Asprey J.A. himself said as to this matter (1968) 3 N.S.W.R. at p.555). He said :-

> "The fact that the bailee may, despite the termination of his bailment, still be under a contractual obligation in relation to the goods is not repugnant to this conclusion; the bailee may for commercial reasons choose to leave the performance of his contract to a third party with the knowledge that he has his own rights against that party if he fails to perform the obligation. Such reasons will be self-evident. As in the instant case, ships cannot wait for the consignee to take delivery of the goods which it discharges at a particular port."

Secondly, the question to which Asprey J.A. addressed himself was whether the ship's bailment of the goods had come to an end. That is a different question from whether the bill of lading itself was in all respects exhausted. If one is considering the ship's position, as Asprey J A. was, in order to contrast it with that of the stevedore, and if one concluded, as he was of the view one should, that that bailment had terminated in a situation where the ship had entrusted an independent contractor to hold the goods pending delivery to a consignee, it is no doubt correct to say that the ship itself remained under no further responsibility <u>as bailee</u> in respect of the goods.

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Thirdly, the defendant in the York Products Case did not rely, as I have already pointed out, upon exceptions in the bill of lading. Here the defendant is relying upon them and its entitlement so to rely upon them is the matter under consideration. Upon the authority of Satterthwaite's case the question is whether the bill, upon its true construction, contemplates that it may. Upon my view of its proper construction it does contemplate obligations upon the ship and its agents (whether independent contractors or not) continuing after discharge on to the wharf of the goods.

Bray's case was also concerned with the ship's obligations as a bailee. Unless it were a bailee of the case of machinery, the exceptions in the bill of lading could not operate to limit its liability. I do not read Macfarlan J. as deciding more then this. Moreover that case can be characterised as one where the damage to the plaintiff's goods was caused by a tortious act of the defendant not in any way connected with the performance by it or its contract to carry or to deliver the goods to the consignee.

For the above reasons I consider that neither the York Products case nor the Bray case assist the plaintiff here. That accords with the view of Henchman D.C.J. in Craw, Son & Lyall Pty. Ltd. v. Patrick Stevedoring Co. Pty.Ltd. (29th May 1974) with whose conclusion I respectfully agree.

Question 2 is accordingly answered in the affirmative.

(3) The final question to be determined is whether, in the circumstances in which the goods were here lost, any of the conditions of the bill of lading operate to excuse the second defendant from liability. Before going to the substance of the competing submissions made in relation to this question, there are some preliminary matters to be mentioned concerning the words used in the clauses. I mention first the final sentence of clause 5 which is in the following terms:-

> "The Carrier shall not be liable in any capacity whatsoever for any non-delivery or mis-delivery or loss of or damage to the goods occurring while

the goods are not in the actual custody of the Carrier."

I am of opinion that the words "while the goods are not in the actual custody of the Carrier", qualify only the words, "loss of or damage to the goods". They do not qualify the words "non-delivery or mis-delivery". The presence of the comma after "mis-delivery" makes this clear. The provisions of clause 2 enable the second defendant to rely upon this provision, that it is not to be liable for non-delivery or misdelivery. These words must, of course, be read in their context and their operation may be nullified by the second defendant's breach of a term of the contract. That is a question to which I shall shortly come. I do not think that the final words of the last sentence of clause 5 help the second defendant. Not only is there a question as to whether they would operate in a case where negligence was established as here; there is also a question as to whether, the second defendant standing, so to speak in the shoes of the carrier, can rely on the words, when it in fact had possession of the goods at the time of the loss. It was in possession of them and it is my opinion that the words, accordingly have no application in the present circumstances. The opening words of clause 2, however, provide a wide exception from liability and the second defendant, of course, relies upon them.

It is agreed between the parties that action was not brought within one year after the date when the goods should have been delivered, 14th May, 1970. The writ was issued on 2nd June 1971. Clause 17 is therefore also relied upon by the second defendant.

It is now necessary to return to a consideration of the facts of the matter. Two views of them were put to me in argument. In the plaintiff's submission it was a clear case of misdelivery of the goods contrary to the provisions of the final words of the bill of lading set out on page 4 hereof.

The plaintiff's submission was that the second defendant could not adopt only those parts of the bill of lading which limited or restricted its liability. If it adopted it to

gain the benefit of such limitations, it became bound by such obligations as there were in relation to delivery as well as entitled to rely upon such exceptions as it contained in relation to that or other matters whilst the goods were in its possession. That submission was not seriously contested, nor do I think that it could have been.

10 The words at the end of the bill of lading required one copy of the bill of lading to be given up in exchange for the goods. Although this provision seems to have been inserted to protect the carrier (or its agents) in the sense that it could refuse delivery unless a copy of the bill were produced, it imports in my opinion, as the plaintiff submitted, a corresponding obligation on the part of the carrier not
20 to deliver in the absence of the production of a copy of the bill. That such an obligation is recognised by the law to exist, notwithstanding such cases as Hisken's case (supra) is well established. I refer, for example, to the words of Lord Denning in the Rambler Cycle Co. case (1959) A.C. at p.536, namely :-

> "It is perfectly clear law that a shipowner who delivers without
> 30 production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading."

It was the plaintiff's view of the evidence that there was a clear breach of this obligation. Mr. Bowdler had allowed the goods to leave the dead house and the wharf without himself checking the documents in the hands of the thief, even though he knew
40 that the tally clerk had not done his job. He accepted without question the thief's assurance that he had been to the delivery office. To the extent that it was not in fact within the scope of Mr. Bowdler's employment to examine documents under any circumstances (Mr. Dermond said that it was not part of his employment to do so) itwas, so the plaintiff submitted, the defendant's system which brought about a situation otherwise than
50 the giving up of the goods in exchange for a copy of the bill of lading.

The second defendant submitted that the facts should be looked at quite differently. It conceded that the thief did not produce a copy of the bill of lading and, for the purposes of the argument, that its negligent system had permitted him to get away with the goods in the way that he did. But no servant of the second defendant purported to make any delivery of the goods at all. Its system provided for the issue of a gate pass upon which the goods would be identified in exchange for a bill of lading and a tally slip. The thief evaded the system by pretending to the watchman that he had complied with it. He tricked him into thinking that he had done what should have been done. In those circumstances, although the crime may properly be characterised as larceny by a trick, it was nevertheless larceny. There was not to be drawn, so it was submitted, any distinction in effect from the present theft and one carried out at a time when the shed was locked by breaking and entering and removal of the goods. If the premises were insecurely locked or inadequately protected by watchmen or security devices clause 2 would operate to excuse the second defendant from liability. It followed, so ran the submission, that, to the extent that the second defendant was in breach of any obligation owed by a bailee not protected by an exception clause to an owner of goods, it was a breach of an obligation safely to take care of the goods. No breach of any obligation connected with the delivery of the goods to the consignee was involved.

I have not found the task of choosing between these two competing views of the facts an easy one. I have decided, however, that the plaintiff's view is to be preferred. The simple fact is that the goods were handed over to the thief by Mr. Bowdler otherwise than in exchange for a copy of the bill of lading. If he had refused to let them go it is most unlikely that the theft would have been carried through.

Accordingly, I find the second defendant to be in breach of an obligation owed to the plaintiff not to deliver its goods otherwise than in exchange for a copy of the bill of lading, and I find that that breach caused the loss of the goods.

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(continued)

The next question is the consequence of that breach. The concept of "fundamental breach" has, of course, been exploded; Suisse Atlantique v. Rotterdamsche (1967) 1 A.C. 361, Sydney City Council v. West 114 C.L.R. 481. In the second of those cases Barwick C.J. and Taylor J. said at pp.488-9:-

> "But we would deny the application of such a clause (the exception clause in that case) in those circumstances simply upon the interpretation of the clause itself. Such a clause contemplates that loss or damage may occur by reason of negligence on the part of the warehouseman or his servants in carrying out the obligations created by the contract. But in our view it has no application to negligence in relation to acts done with respect to a bailor's goods which are neither authorized nor permitted by the contract.
>
> ....
>
> To our minds the clause clearly appears as one which contemplates that, in the performance of the Council's obligations under the contract of bailment, some loss or damage may be caused by reason of its servants' negligence but it does not contemplate or provide an excuse for negligence on the part of the Council's servants in doing something which it is neither authorized nor permitted to do by the terms of the contract."

In the Suisse Atlantique case Lord Wilberforce said at p.432 :-

> "In application to more radical breaches of contract, the courts have sometimes stated the principle as being that a 'total breach of the contract' disentitles a party to rely on exceptions clauses. This formulation has its use so long as one understands it to mean that the clause cannot be taken to refer to such a breach but it is not a universal solvent: for it leaves to be decided what is meant by a 'total' breach for this purpose - a departure from the contract? but how great a departure?; a delivery of something or a performance different from that promised? but how different? No formula will solve this type of question and one must look individually at the nature of the

contract, the character of the breach and its effect upon future performance and expectation and make a judicial estimation of the final result."

Both the plaintiff and the second defendant relied upon West's case. The second defendant felt able to do so because of the dissent of Kitto and Menzies JJ. and the somewhat different approach to the solution of the problem adopted by Windeyer J. who agreed in the conclusion of Barwick C.J. and Taylor J. that the defendant was not, in the circumstances, entitled to rely upon the exception clause. 10

In West's case a vehicle had been stolen from a parking station. The owner had received a parking ticket which bore under the head "Parking Conditions" the following words :-

> "The Council does not accept any responsibility for the loss or damage to any vehicle or for loss of or damage to any article or things in or upon any vehicle or for any injury to any person however such loss, damage or injury may arise or be caused." 20

Following upon the parking conditions there was a clause headed "Important" which read:-

> "This ticket must be presented for time stamping and payment before taking delivery of the vehicle." 30

The thief entered the parking station and claimed to have lost the ticket issued to him in respect of his vehicle. In fact he had no vehicle parked in the parking station. He was issued with a duplicate ticket in respect of a vehicle not in the parking station at all. He drove the plaintiff's vehicle out of the parking station. He was permitted to do so by the fact that the attendant at the gate accepted the duplicate ticket 40 earlier given to him, although the number on the ticket did not correspond with that upon the car which he drove away.

Because of the arguments addressed to me I should refer to some passages in the judgment of Windeyer J. It seems to me that what his Honour said at p.501 is not without significance for the present case. He said:-

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"Now what does the card say? It must be read as a whole so far as it records the terms of the bailment. It seems to me that it says two things. The first puts a higher duty on the appellant in respect of delivery or misdelivery than the law would otherwise impose. The second gives an immunity from liability that in other respects might arise from neligence or misconduct by the appellant's servants in relation to the custody of the car. The contract between the parties thus makes the obligation of the appellant more strict in respect of one matter, while relieving it of liability in respect of others."

After referring on p.502 to the wide terms of the exception clause and to the fact that it related primarily to loss or damage occurring while the vehicle was in the station, his Honour continued :-

"However that may be, it would, I think, cover any loss by explosion or fire occurring on the premises and probably too any loss by theft which did not involve an actual release or delivery of the vehicle to a person not presenting the card."

Later his Honour said (pp.502-3) :-

"The principle that Scrutton L.J. enunciated in Gibaud v. Great Eastern Railway Co. (1921) 2 K.B.426, referred to in the House of Lords in London and North Western Railway Co. v. Neilson (1922) 2 A.C. 263, is in point. His Lordship said that '...if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it' (1921) 2 K.B. at 435. In this case the contract was broken because the appellant did not do the thing it had contracted to do in the way in which it had contracted to do it.

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The respondent's cause of action could I think be appropriately formulated by averments that the appellant had, for reward, promised the respondent to undertake the custody of his vehicle and to release it from its said custody upon presentation of the card and not otherwise, yet without the card being presented released it, whereby it was lost. And, the loss having thus occurred, an action would also lie in detinue: Jones v. Dowle (1841) 9 M. & W. 19 (152 E.R.9). 10

I am therefore of opinion that this appeal should be disposed of in the way that the Chief Justice and Taylor J. propose in their judgment which I have had the advantage of reading. I reach the same conclusion as do their Honours, but by a somewhat different, and perhaps narrower route. That does not mean, however, that I might not in another case be ready to follow their path." 20

The basis for the decision of Barwick C.J. and Taylor J. is to be found in the following passage fron their judgment (pp.489-90) :-

"The fact that the attendant at the exit through which the car was driven was negligent is of no consequence in the case; the act of delivery was one which was neither authorized nor permitted by the contract and in our view the appellant was not entitled to be exonerated by the exempting clause." 30

I agree with counsel for the plaintiff that West's case is very close to the present one. I do not find such a difference of view between Barwick C.J. and Taylor J. on the one hand and Windeyer J. on the other to warrant my preferring or being bound by the views to be found in the dissenting judgments. 40

Despite the similarity of West's case with the present one I do not think that it is decisive of this one. There are some points of distinction in the contracts in the two cases. Although the clause in West's case is very wide, it does not refer, as does clause 5 here to misdelivery. But in the light of the breach by the second defendant of the express obligation to deliver only 50

against a copy of the bill of lading, I think, notwithstanding the use of that word in clause 5, that the defendant is precluded from relying upon it. On the findings I have made it is not a case of it performing its contract negligently; it is a case where it has given up possession of the goods in breach of an express obligation binding upon it. It has not performed the contract as it was contemplated by the parties it would. If, in the words of Lord Wilberforce cited above, the appropriate course is to make a judicial estimation of what the final result should be in the light of the factors he mentions, I conclude that the second defendant did perform, or purport to perform, its part of the contract differently from the way in which it promised to carry it out. In my opinion there was a "total breach of the contract" in the sense in which his Lordship uses that expression in the passage mentioned.

I am therefore of opinion that the second defendant is not entitled, in the circumstances of this case, to rely either upon the provisions of clause 2 or of clause 5 of the bill of lading.

The final question to be considered is whether it is entitled to rely on the provisions of clause 17. I have no doubt that the original purpose of this clause was to protect the carrier against claims made against it in respect of liability which it could not shed in respect of breaches of the Hague Rules. Indeed the first sentence of the clause is in identical terms with the third paragraph of Article III Rule 6 of the Rules. It might be thought, therefore, that the clause should be limited to apply, notwithstanding the provisions of clause 2, to actions against the ship or its owners or charterers. But so to limit it does not give effect to the words of clause 2. That clause contains the word "immunity" followed by the words "of whatsoever nature applicable to the Carrier...". The provisions of clause 17 clearly confer immunity from suit once the period mentioned has run. It seems to me that it must follow from Satterthwaite's case that the second defendant is entitled to rely upon that immunity if the circumstances of the case otherwise indicate that it is entitled so to do, notwithstanding that this is not an action upon the bill of lading.

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(continued)

On behalf of the plaintiff it was submitted that the same considerations as are relevant in considering the entitlement of the second defendant to rely on the provisions of the opening words of clause 2 and the closing words of clause 5 were applicable. I do not accept this submission. Those provisions, as I have held, operate to excuse the defendant from liability in the circumstances mentioned therein, provided that what the defendant has done does not involve it in a substantial departure from the method selected by the parties for the defendant's performance of the contract deemed to have arisen between them. Clause 17 is intended to serve a very different purpose from clauses 2 and 5 and also 8. It is intended to confer on those entitled to its benefit an immunity from suit once the period mentioned in it has expired. It envisages that the carrier and, by reason of the operation of clause 2, his independent contractors, are to be immune from suit in respect of the goods if action is not brought within the time specified, no matter what breach of the contract the defendant may have committed. The whole purpose of the clause is to confer immunity from suit. It envisages that but for its provisions the defendant will be liable to be sued. In those circumstances I think the fact that the action was instituted after the expiration of twelve months from the date when the goods should have been delivered is an answer to the plaintiff's claim against the second defendant. For that reason there will be judgment for the second defendant in the proceedings.

My findings make it unnecessary to determine the third party proceedings which were instituted by each defendant against the other. However, if my judgment had been for the plaintiff against either or both defendants the result of such proceedings would have been an indemnity for the first defendant (if it were held liable to the plaintiff) against the second defendant and no recovery by the second defendant against the first. In my opinion the loss of the goods was clearly caused by the negligence of the second defendant and its employees. There is no basis for a finding that any ultimate responsibility for loss should be borne by the first defendant.

Before concluding this judgment I feel obliged to mention a general matter unconnected with the resolution of the liability of the

defendants. I do so because of what is contained in the penultimate paragraph of Lord Wilberforce's judgment in Satterthwaite's case (1975) A.C. at p.169, namely :-

> "In the opinion of their Lordships, to give the appellant the benefit of the exemption and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat these intentions. It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get round exemptions (which are almost invariable and often compulsory) accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in the rates of freight. They see no attraction in this consequence."

I have adverted to the fact that the appeal in that case was from New Zealand and not this country. There are factors in the evidence in this case which disturb me. Evidence to a similar effect but not involving such serious consequences has been given in other cases coming before this court and before the District Court. One asks oneself why the tally clerk in this case continued to sit in the sun, as Mr. Bowdler said he did. Why is it not part of Mr. Bowdler's duties to inspect documents when he is out of sight of the delivery office and knows the tally clerk has not done his job? His understanding was that the reasons for this were industrial ones. He would be accused of doing other mens' work. Mr. Dermond said that this was only one reason; there were others, but what they were does not appear. Such a system, without reflecting upon the integrity of anyone in this case, makes "inside jobs" easier to carry out. According to Mr. Bowdler he has seen the same thing occur on other occasions. He said:-

> "It goes on all the time. I would say it was quite all right. I've even let cases of guns and pistols go out the same way. The tally clerk - sometimes you will ask a tally clerk to come up and they have been short and have been doing three jobs."

It is true that I have only Mr. Bowdler's evidence for this, but he was called by the plaintiff. He could have been cross-examined about it by counsel for either defendant. The first defendant was not to know at the time he gave his evidence that it would escape liability in the way that it has. The second defendant was Mr. Bowdler's casual employer. Neither counsel cross-examined him about this matter. 10

I have mentioned what I have in order to indicate to those who sit on the Privy Council before whom this problem may again come that this matter involves in this country, at least, a little more than a commercial transaction and the amount of freight rates. I hasten to add in case it be said that the matters I have mentioned are not relevant to the matters mentioned by his Lordship, that in my respectful opinion 20 they are, and for the following reasons. If carriers and their independent contractors are permitted to contract themselves out of liability in the way that they do, freight rates will unquestionably be lower; but insurance rates payable by shippers and consignees will be higher. Those who insure goods will have no control over what occurs on the wharves of ports in this country. Their rates, which will affect the price of 30 goods imported into this country, will be high because they will know that in many cases they have to insure in circumstances where "anything goes". If it were the stevedores who were bound to insure, the insurers could, if they thought liability to pay would exist in every case of negligence, impose conditions upon which their insurance would be effected. They could require steps to be taken to see to it that proper systems 40 for the safekeeping of goods were instituted and enforced. That is what they do in relation to fire and burglary insurance now. In the case of fire insurance proper and adequate sprinkler and alarm systems will need to be installed. Otherwise the insurance premiums payable will be prohibitive or, in some cases, no insurance will be effected at all. Similar considerations apply in the case of burglary insurance if proper locks, 50 and adequate alarm systems and other security devices are not utilised. Keeping costs down is not the only benefit in imposing liability upon the stevedore rather than the consignee. There is also sound reason for doing so in the

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interests of maintaining standards from the point of view of the community. This will tend to prevent the sort of things mentioned by Mr. Bowdler from occurring. I regret spending a little time on these matters, but it seemed to me that I should deal with them, although they are probably matters more appropriate to be considered by the legislature, in the light of what is to be found in their Lordships' judgment. 10

In the result there will be judgment for the defendants. The plaintiff is ordered to pay the costs of each defendant.

I certify that this and the 33 preceding pages are a true copy of the reasons for judgment herein of His Honour, Mr. Justice Sheppard.

Sd. B.Rodgers
Associate

20 Dated 15-7-75

In the Supreme Court of New South Wales
Court of Appeal

No. 4
Notice of Appeal

22nd August 1975

No. 4

NOTICE OF APPEAL
22nd August 1975

IN THE SUPREME COURT) Commercial Causes No.
OF NEW SOUTH WALES) 5033 of 1971
COURT OF APPEAL) Court of Appeal No.
256 of 1975

BETWEEN: SALMOND & SPRAGGON (AUSTRALIA) PTY. LIMITED Plaintiff

AND: JOINT CARGO SERVICES PTY. LIMITED First Defendant 10

AND: PORT JACKSON STEVEDORING PTY. LIMITED Second Defendant

NOTICE OF APPEAL

Appellant: Salmond & Spraggon (Australia) Pty. Limited
Respondent: Port Jackson Stevedoring Pty. Limited

The appellant appeals from so much of the decision of his Honour Mr.Justice Sheppard whereby his Honour entered a verdict on 14th July 1975 for Port Jackson Stevedoring Pty. Limited. 20

GROUNDS:

1. That his Honour was in error in holding that the said defendant, as stevedore, was legally entitled to the benefit of the exempting provisions and particularly of clauses 2, 5 and 17 contained in the Bill of Lading being Exhibit A in the proceedings for the reason that the said defendant was not a party to and did not provide consideration for the said Bill of Lading. 30

2. That his Honour was in error in holding that the exempting provisions and particularly clauses 2, 5 and 17 contained in the said Bill of Lading applied to relieve the said defendant from liability to the plaintiff in the proceedings for the reasons that :-

(a) the said defendant was not a party to the said Bill of Lading; 40

(b) the goods the subject of the proceedings were lost as a result of the negligence of the said defendant after they had been discharged from the vessel on which they were shipped;

(c) the goods the subject of the proceedings were lost as a result of the negligence of the said defendant whilst they were in custody and possession of the said
10 defendant;

(d) at the time and in the circumstances when the said goods were lost the said defendant, as stevedore, was not performing any contractual obligation imposed upon the shipowner in relation to the said goods by the said Bill of Lading;

(e) at the time and in the circumstances when the said goods were lost the said
20 defendant, as stevedore, was not performing any contractual obligation imposed on the shipowner by the said Bill of Lading in relation to the said goods as to which the shipowner was entitled to be relieved from liability by the provisions of the said Bill of Lading.

3. That his Honour was in error in holding that the provisions of the said Bill of Lading, including the said exempting provisions, were
30 not exhausted after the goods were discharged from the ship's tackle.

4. That his Honour was in error in holding that the provisions of the said Bill of Lading, including the said exempting provisions, remained in force for the benefit of the said defendant after the goods were discharged from the ship's tackle.

5. That his Honour was in error in holding that upon a proper construction of the said
40 Bill of Lading the shipowner was bound to make delivery of the said goods to the plaintiff.

6. That his Honour was in error in holding that the contractual relationship between the shipowner and the plaintiff, on the one hand, and the shipowner and the said defendant, on the other hand, was one contract only.

7. That his Honour was in error in holding

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(continued)

that the said defendant had ratified the contract evidenced by the said Bill of Lading.

8. That there was no evidence upon which his Honour could find and hold that the said defendant had ratified the contract evidenced by the said Bill of Lading.

9. That his Honour was in error in holding on the facts found by his Honour that the said defendant :-

(a) was entitled to rely upon clause 17 of the said Bill of Lading; and 10

(b) was entitled to be relieved from liability by reason of non-compliance by the plaintiff with the provisions of clause 17 of the said Bill of Lading.

10. That his Honour was in error in holding that the reasons for judgment of the Judicial Committee of the Privy Council in New Zealand Shipping Company Limited v. A.M.Satterthwaite & Company Limited was determinative of the proceedings. 20

11. That his Honour was in error in holding that as the proceedings were not instituted within twelve (12) months from the date when the goods should have been delivered the said defendant was entitled to succeed in the proceedings.

ORDERS SOUGHT:

1. That the appeal be upheld.

2. That in lieu of a verdict for the said defendant there be a verdict in the said proceedings for the plaintiff against the said defendant in the sum of Fourteen thousand six hundred and eighty four dollars and ninety eight cents ($14,684.98). 30

3. That the said defendant pay the Plaintiff's costs.

Appeal papers will be settled on 2.10.1975 at 10.15 a.m. in the Registry of the Court of Appeal. 40

TO THE RESPONDENT:

Before you take any steps in these proceedings you must enter an appearance in the Registry.

APPELLANT:	SALMOND & SPRAGGON (AUSTRALIA) PTY. LIMITED of Loyalty Road, North Rocks.
SOLICITOR:	MARY ELIZABETH THOMSON of Messrs. M.E.Thomson Rich & Co. 109 Pitt Street, Sydney, 231.3055
APPELLANT'S ADDRESS FOR SERVICE:	C/- M.E.Thomson Rich & Co. 109 Pitt Street, Sydney.
ADDRESS OF REGISTRY:	Supreme Court, King Street, Sydney.

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(continued)

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Sd: M.E.Thomson

Solicitor for the Appellant

FILED: 22 August 1975

No.5

REASONS FOR JUDGMENT OF HIS HONOUR MR. JUSTICE HUTLEY 19th August 1976

No.5 Reasons for Judgment of His Honour Mr. Justice Hutley

19th August 1976

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IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COURT OF APPEAL)

C.A. No. 256 of 1975
C.C. No. 5033 of 1971

CORAM: HUTLEY, J.A.
GLASS, J.A.
MAHONEY, J.A.

Thursday, 19th August 1976

SALMOND & SPRAGGON (AUSTRALIA) PTY.LIMITED
v.
JOINT CARGO SERVICES PTY. LIMITED & ANOR.

30

JUDGMENT

HUTLEY, J.A. : I have read the judgment proposed by Glass, J.A. and accept his statement of the basic facts. I also agree that the attack upon the finding that the appellant's negligence

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(continued)

caused the loss of the goods in that its system and the manner of performance or non-performance of the duties of its servants made the theft possible, and that the liability of the carrier and the stevedore had not ceased when the goods came over the ship's rail, fails. I also agree that the carrier had actual authority from the stevedore to make an offer on its behalf to the consignee under the bill of lading. 10

There are two issues of difficulty which remain for consideration :

(1) Did the fact that there was no proof that the stevedoring work which was done, was done in consequence of the offer which was procured, mean there was no consideration for the contract; and

(2) Was the limitation clause (i.e. cl.17) applicable in the events which have happened.

The argument on the first issue was 20 founded on the judgment of the High Court in The Crown v. Clarke 40 C.L.R.227. This is one of the large class of cases in which an offer is made to the world which is open to acceptance by performance, without any prior indication of the intention to accept. The doing of the act of acceptance may occur accidentally or alio intuitu so that it cannot be said to be a response to the offer. However, Starke, J. said at 30 p.244 :

> "As a matter of proof any person knowing of the offer who performs its conditions establishes prima facie an acceptance of that offer."

The stevedore knew of the offer. In The Crown v. Clarke the evidence of the respondent to the appeal established positively that the information was not given as a result of the offer. If this dictum were sound I 40 would think that the appellant would fail on this point. The evidence tended to rebut the case that the offer of the stevedore to unload the goods was on the terms of the protections in the bill of lading was provided by certain answers to particulars sought by the plaintiff of the defendant. The particulars were as follows :-

"3. If orally or partly orally, when and

whereby and by whom on behalf of the first defendant was it so employed, who arranged the employment on behalf of the second defendant and what were the terms of such employment?

4. If in writing or partly in writing please supply copies of such writing or alternatively state when and where they may be inspected on behalf of the plaintiff."

and the relevant reply :

"3. & 4. Prior to the arrival of the "New York Star" in Sydney, an officer (whose name is not known) of the first defendant orally requested an officer of the second defendant (whose name is not known) to supply sufficient dock labour, delivery clerks and watchmen to discharge and re-load the "New York Star" which was due to arrive at No.2 wharf, Glebe Island, on 9th May 1970. The terms of the employment were to be in accordance with a document headed "Port Jackson Stevedoring Pty.Limited - Basic Terms and conditions for Stevedoring at Sydney New South Wales". A copy of such document is enclosed."

The annexed document deals principally with rates, though it does contain a provision for limiting the liability of the stevedore. The defendant had regularly performed all the stevedoring work of the carrier for years.

The contract under which the stevedore obtains the benefit of exemptions is made on the performance of the duty to discharge. The contract of employment therefore preceded this contract. It does not follow that the offer of a contract which gave immunity did not contribute to willingness to perform the work which closed the contract. The offer was a standard one made in the ordinary course of business and probably known to have been made prior to the contract for stevedoring services for the New York Star was made. However, it is not, for it is contrary to the following passage from the judgment of the court (Dixon C.J., Williams, Webb, Fullagar and Kitto, J.J.) in _Australian Woollen Mills Pty.Ltd. v. The Commonwealth_, 92 C.L.R. 424 at 456 :

"In cases of this class it is necessary, in order that a contract may be established, that it should be made to appear that the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement. Between the statement or announcement, which is put forward as an offer capable of acceptance by the doing of an act, and the act which is put forward as the executed consideration for the alleged promise, there must subsist, so to speak, the relation of a quid pro quo. One simple example will suffice to illustrate this. A, in Sydney, says to B in Melbourne: 'I will pay you £1,000 on your arrival in Sydney'. The next day B goes to Sydney. If these facts alone are proved, it is perfectly clear that no contract binding A to pay £1,000 to B is established. For all that appears there may be no relation whatever between A's statement and B's act. It is quite consistent with the facts proved that B intended to go to Sydney anyhow, and that A is merely announcing that, if and when B arrives in Sydney, he will make a gift to him. The necessary relation is not shown to exist between the announcement and the act. Proof of further facts, however, might suffice to establish a contract. For example, it might be proved that A, on the day before the £1,000 was mentioned, had told B that it was a matter of vital importance to him (A) that B should come to Sydney forthwith, and that B objected that to go to Sydney at the moment might involve him in financial loss. These further facts throw a different light on the statement on which B relies as an offer accepted by his going to Sydney. They are not necessarily conclusive but it is now possible to infer (a) that the statement that £1,000 would be paid to B on arrival in Sydney was intended as an offer of a promise, (b) that the promise was offered as the consideration for the doing of an act by B, and (c) that the doing of the act was at once the acceptance of an offer and the providing of an executed consideration for a promise. The necessary connection or relation between the announcement and the act is

provided if the inference is drawn that A has requested B to go to Sydney"

The requisite evidence has not been given in this case and the appellant succeeds on this issue.

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(continued)

The second substantial issue is whether the limitation of action clause in the contract (cl.17) should be read down so as not to be available in the case of fundamental breach. On the face of it, it does seem ridiculous that a reasonable limitation of actions clause, that is, one which does not prescribe a time which is so short as to amount to a denial of an effective remedy in the event of breaches of the obligations in the contract should be denied its apparent effect. It could not be suggested, nor was it, that the restriction was inherently unreasonable. However, it was said that the court was bound by authority to so conclude.

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The leading case on problems of exemption clauses in English law is Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale (1967) 1 A.C.361. At p.406 Lord Reid said :

"I have no doubt that exemption clauses should be construed strictly."

His Lordship then set out the clause and continued :

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".....I think that this case must be decided by considering whether there is any ground for adopting any but the natural meaning of the demurrage clause ...... It is impossible to hold that these words are not wide enough to apply to the circumstances of the present case, whether or not there was fundamental breach. So the only question is whether there is any reason for limiting their scope.......I can find no such reason. The appellants chose to agree to what they now say was an inadequate sum for demurrage, but that does not appear to me to affect the construction of this clause. Even if one assumes that the $1,000 per day was inadequate and was known to both parties to be inadequate when the contract was made, I do not think that it can be said that giving to the clause its natural

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(continued)

meaning could lead to an absurdity or could defeat the main object of the contract or could for any other reason justify cutting down its scope."

With the substitution of "inadequate time for bringing an action for breach" for "inadequate sum for demurrage" and "one year" for "$1,000 per day" the words are directly apposite. They are consistent with the judgments of the other Lords. They are difficult to reconcile with the following passage in the judgment of Lord Sumner in Atlantic Shipping and Trading Co. v. Louis Dreyfus & Co. (1922) 2 A.C. 250 at 261, where His Lordship said :

> "My Lords, in principle I think that clause 39, in so far as the parties, as it was said, provided their own statute of limitations, is unavailable to the shipowners as an answer to a claim for damage caused by unseaworthiness. It does not make any difference that the time allowed is considerable or the formality to be complied with not unreasonable, or that the clause, being a mutual clause, might apply to protect the charterer in certain events, for example, against a claim for demurrage."

In the light of later decisions this doctrine must be regarded as confined to damage caused by unseaworthiness or as superseded. In so far as the doctrine of Suisse Atlantique has received the express approval of the High Court in H. & E. Van Der Sterren v. Cibernetics (Holdings) Pty. Limited, 44 A.L.J.R. 157, the above passage must be taken not to be good law in Australia.

In my opinion the appeal should be allowed with costs and a verdict for $14,684.98 entered in favour of the appellant.

As to the costs at first instance, the appellant has succeeded on a point which was not raised and argued below. On the other hand, in the hearing below most of the grounds of defence urged by the respondent were rejected by the trial judge. An appellant who fails to bring before the court at first instance its whole case should not, in my opinion, receive all its costs. In my opinion the question of costs, both of the trial and of the appeal, and of the propriety

of making an order under the Suitors' Fund Act, should be reversed so the parties can make submissions to the court after they have had the opportunity of studying the judgment of the court.

I certify that this and the preceding 4 pages are a true record of His Honour's Reasons for Judgment.

10 Sd. M. White
ASSOCIATE

19.8.76

In the Supreme Court of New South Wales
Court of Appeal

No.5
Reasons for Judgment of His Honour Mr. Justice Hutley

19th August 1976

(continued)

IN THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL) C.A. 256 of 1975
) C.C. 5033 of 1971

CORAM: HUTLEY, J.A.
GLASS, J.A.
MAHONEY, J.A.

Thursday, 19th August, 1976

No.5
Reasons for Judgment of His Honour Mr. Justice Glass

19th August 1976

20 SALMOND & SPRAGGON (AUSTRALIA) PTY.LIMITED
v.
JOINT CARGO SERVICES PTY. LIMITED & ANOR.

JUDGMENT

GLASS, J.A. : The plaintiff was the consignee of a shipment of razor blades carried from St.John, New Brunswick to the port of Sydney in a vessel owned by the Blue Star Line Limited. The goods were discharged on or about the 12th May, 1970 by the defendant Port Jackson
30 Stevedoring Pty. Limited (the stevedore) and landed by it on the adjacent wharf which was at all relevant times in its possession. Because the shipment was specially vulnerable to theft, it was placed by the stevedore in a section of the shed on that wharf known as the deadhouse. Within a day or so the goods were stolen and have not since been recovered. The parties are in agreement that the cargo had a value of $14,684.98
40 which the plaintiff should recover if the defendant is responsible in law for its loss.

The trial judge found various issues in favour of the plaintiff consignee and others in favour of the defendant stevedore but directed the entry of judgment for the defendant. Both parties have appealed. It will be convenient not to segregate the appeals but to deal with questions in the order in which they arise for decision. It should be mentioned that the first defendant, the carrier's agent, was exonerated from any responsibility at the trial. Since there is no appeal against this finding, the first defendant may hereafter be disregarded. 10

The first question, arising in the defendant's appeal, is one of pure fact and relates to the circumstances in which the goods were lost and whether that loss was attributable to any default on the part of the stevedore. The judgment below contains a precise and detailed account of the system of the defendant stevedore for the storage of goods on the wharf and in the shed and their delivery to the consignees. It also describes the nature of the trick by means of which the thief obtained possession of the goods. It would serve no valuable purpose if I were to restate these matters in full and a summary could be misleading. It is, I think, sufficient to record that in his Honour's judgment the theft was caused both by negligence in the system as laid down by the stevedore and by casual negligence of its employees in the operation of that system. The former conclusion was based on evidence that the system was so devised by the stevedore that some of its employees handled the goods while another examined the shipping documents. The division of responsibility made it possible for an enterprising thief to obtain goods from the deadhouse without producing documents to anyone. This feature of the system was properly regarded as proof of a deficiency in the reasonable care to be expected of a custodian of goods exposed to a special risk of pilfering. The second finding was based upon the failure of the tally clerk to check the goods on to the truck. This omission facilitated the thief's plan of bypassing the delivery office where documents would have to be produced. Counsel for the stevedore has sought to disturb these findings of fact. In my opinion, however, his Honour's conclusion that negligence of the stevedore caused the loss of the goods is invulnerable to attack. It follows that the

plaintiff is entitled to recover unless the defendant is exonerated by some bargain made between them.

The next question arises in the plaintiff's appeal in relation to a defence which the trial judge upheld. This was that the stevedore was not liable for its negligence because it was entitled to rely on the exemption clauses contained in the bill of lading. This document sets out the contract between the shipper and the carrier. It has for some time been established law /Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co.Ltd. (1924) 1 K.B. 575_/ that by accepting the bill of lading and asking for the delivery of the goods, the consignee is entitled to the benefit of and bound by its stipulations vis a vis the carrier. But more recently it has been heldthat if certain conditions exist, the protection given by the bill of lading to the carrier will also be available to the stevedore against the consignee /The Eurymedon (1975) A.C. 154_7. Those conditions are four in number and their nature has been authoritatively defined by the decision of the Privy Council. In support of its claim for protection, the stevedore observes that the relevant bill of lading contained what is called in the trade a Himalaya clause. This was in the following terms :

> "2. It is expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be

available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading."

The application of this clause as between the plaintiff consignee and the defendant stevedore depends upon a number of considerations, some of law, some of fact. Some of them are conceded, some are disputed. It is accepted that the carrier's principal obligations under the bill of lading were three in number viz. to carry the goods, discharge them from the vessel and deliver them to the consignee. It is also accepted that the last two of these obligations were being performed by the stevedore as an independent contractor employed by the carrier. This contract will be referred to in due course. According to the Eurymedon doctrine, such a clause will operate to confer on the stevedore at the expense of the consignee the protection which clause 2 as well as clauses 5 and 17 give to the carrier, provided four conditions are satisfied. They are :

1. The bill of lading must make clear an intention to protect the stevedore.

2. It must also make clear that the carrier contracts for the stevedore's protection as well as his own.

3. The authority of the carrier so to act or later ratification by the stevedore must be proved.

4. There must be consideration from the stevedore for the protection extended to him.

The first and second of these requirements are now and have at all times been conceded. At the trial the fourth was also conceded. The third alone was put in issue but his Honour

found that ratification had been proved. Before this Court, however, the plaintiff submits that the fourth requirement viz. consideration has not been satisfied and that in its absence the stevedore is not entitled to invoke the protective clauses in the bill of lading. It was given express leave to rely on the submission once it was conceded by the defendant that its case at the trial would not have been differently presented if the point had been specifically taken.

I do not think that there can be any question that the carrier in bargaining for the protection of this stevedore was acting with its authority. The stevedore has for years enjoyed a monopoly of the carrier's business in the port of Sydney. Bills of lading containing the Himalayan clause had been in use for some time before 1970. The stevedore proved that it was familiar with the terms of the bill of lading in general and with the clauses purporting to exempt independent contractors in particular. There was also evidence that prior to the loss of the goods in question, claims had been made on the stevedore and rejected in reliance upon the exemption clauses. There is from this material, in my opinion, a clear implication that when the carrier included the Himalayan clause in its bills of lading it did so as agent with the authority of its principal the stevedore. (For this limited transaction their roles were reversed, the employer becoming the agent and the independent contractor the principal). A reasonable man examining the conduct of both parties would conclude that one had authorised the other to act as agent and the other had agreed so to act [Bowstead on Agency (13th) Article 9]. It is therefore unnecessary to consider whether, failing authority, ratification later took place.

The question of consideration comes next. It may for convenience be expressed interrogatively as follows : Has it been shown that the shipper's promise to limit and exclude the liability of the stevedore is supported by consideration which moved from the latter? The majority decision in Eurymedon stresses that a technical and schematic approach to the subject must yield

In the Supreme Court of New South Wales

No.5
Reasons for Judgment of His Honour Mr. Justice Glass

19th August 1976

(continued)

to practical considerations. It may not be possible to determine whether the shipper's promise to exempt the stevedore is an offer to be accepted by performance or a promise in exchange for an act. It was there held that on either view the shipper's promise became binding when the "appellant performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading" /at 168/. It was also held that the conduct of the stevedore amounted to valid consideration supporting the shipper's offer notwithstanding that it was bound so to act under its agreement with the carrier /Scotson v. Pegg (1861) 6 H & N. 295/. The plaintiff submits, however, that the stevedore has failed to show that it gave consideration in the present case. He relies on a principle of contract law not discussed in the Eurymedon. It is the rule that where conduct is relied on as the acceptance of and consideration for an offer, the acceptor must be shown to have acted on the offer /The Crown v. Clarke (1927) 40 C.L.R. 227/.

> "The controlling principle, then, is that to establish the oonsensus without which no true contract can exist, acceptance is as essential as offer, even in a case of the present class where the same act is at once sufficient for both acceptance and performance. But acceptance and performance of condition, as shown by the judicial reasoning quoted, involve that the person accepting and performing must act on the offer." /Ibid at 234-5/

Alternative formulations to be found in the judgments are that the acceptor must act upon the faith of or in reliance upon the offer. There must be a nexus between the offer and the conduct relied on as acceptance. By parity of reasoning a similar connection would be required if the conduct was to be classified as the performance of an act in exchange for a promise.

The plaintiff then submits that although the stevedore's knowledge of the exempting offer could be inferred, there is no evidence

that in performing its stevedoring functions it did so in reliance upon the offer. There was tendered in evidence a document headed "Port Jackson Stevedoring Pty.Limited: Basic Terms and Conditions for Stevedoring at Sydney N.S.W." It set out the conditions of employment and rates of remuneration which applied to work undertaken by the stevedore for shipowners in the port of Sydney. The document formed part of Exhibit G together with a letter from the stevedore's solicitors stating that the stevedore was employed by the carrier upon terms which accorded with the document. These two documents plus the evidence that the stevedore unloaded the plaintiff's goods and stowed them in its shed constitute the whole of the material bearing upon this issue. For reasons already given his Honour was not called upon to decide it. It is necessary for this Court to decide whether this evidence measures up to the requirements of the fourth condition. I am not satisfied that it does. I find that the stevedore knew of the shipper's offer to exempt. But it was bound to carry out stevedoring operations under its contract. For all that appears there may have been no relationship whatever between the conduct of the stevedore and its knowledge of the offer/Australian Woollen Mills Pty.Ltd. v. The Commonwealth (1953-54) 92 C.L.R. 424 at 457_/. It is quite consistent with the facts proved that the stevedore acted as it did solely because of the contract it had made with the carrier. For these reasons I conclude that there is a fatal gap in the stevedore's proofs of the fourth condition on which the Eurymedon doctrine depends. Having shown no consideration for it, the defendant is unable to claim against the plaintiff the protection of the exemption clauses contained in the bill of lading. It follows that it has no defence and the plaintiff is entitled to recover.

Upon the assumption, however, that it was entitled to that protection, two further arguments were addressed to this Court and to the court at first instance. I propose briefly to express my views on these submissions. The first depended upon the following two propositions viz. (a) that the stevedore in delivering the goods otherwise than in exchange for the bill of lading was guilty of a fundamental breach of the contract (b) that in accordance doctrine of the Suisse Atlantique case/(1967)

In the Supreme Court of New South Wales Court of Appeal

No.5
Reasons for Judgment of His Honour Mr. Justice Glass

19th August 1976

(continued)

In the Supreme Court of New South Wales Court of Appeal

No.5
Reasons for Judgment of His Honour Mr. Justice Glass

19th August 1976

(continued)

A.C. 361_7 the exception clauses do not apply to such a breach. I am satisfied that the stevedore's conduct amounted to a fundamental breach. The duty not to deliver goods except in exchange for the shipping documents is imposed both by the concluding words of the bill of lading and by the common law /Sze Hai Tong Bank Ltd. v. Rambler Cycle Co.Ltd. (1959) A.C. 576/ while conceding the existence of this duty, counsel for the stevedore submitted that there was no breach of it disclosed by the evidence and this His Honour erred in holding that there was. He placed principal reliance upon a sentence appearing in one of the judgments in the High Court in The Council of the City of Sydney v. West /(1965-66) 114 C.L.R. 481 at 489/ for a submission that the employees of the defendant yielded custody only and at no stage delivered possession of the goods to the thief. He argued that no delivery of the goods had been made to the thief until the latter, though lacking a gate pass, contrived to exit through a barrier manned by someone other than the stevedore's employees. So, the argument ran, the stevedore did not misdeliver the goods although its negligence caused their loss. I cannot agree that what was said by way of description of the miscreant's behaviour in West's case is decisive or even relevant to the findings made concerning the position of the stevedore in the present appeal. I am satisfied that the defendant by itself and its servants delivered the goods to the thief by allowing him as a result of their various defaults to load them onto his truck without having produced any documents. More importantly, his Honour also was so satisfied. His finding that the conduct for which the stevedore was responsible amounted to a breach of the duty not to misdeliver is a finding of fact. It involved a view of the defendant's conduct which was reasonably open to him and is not liable to be disturbed /Edwards v. Noble (1971 125 C.L.R. 297_7. Accordingly the stevedore had been guilty of a fundamental breach of the contract between it and the consignee, assuming contrary to my view that the Eurymedon doctrine made it binding on him.

I am also satisfied that it was proper to conclude, as his Honour did, that the protection contained in clauses 2 and 5 does not apply to the fundamental breach which the stevedore committed. Under clause 2 it is provided that the carrier and its independent

In the Supreme Court of New South Wales Court of Appeal

No.5
Reasons for Judgment of His Honour Mr. Justice Glass

19th August 1976

(continued)

contractor shall not be liable for any loss resulting from any default on their part. Under clause 5 the carrier (which under clause 2 would include its independent contractor) is not liable for any misdelivery. In order to determine the question whether these exemptions should apply to the fundamental breach which occurred it is necessary to make a judicial estimation after looking at the nature of the contract and the character of the breach /Suisse Atlantique supra at 432_7. In my estimation to apply clauses which exonerate the stevedore from all responsibility to a situation where it has handed over the goods without an exchange of documents would "deprive the protected party's stipulations of contractual force" or "would destroy the whole contractual substratum" /Ibid at 431-2/. But I am unable to reach the same estimation with respect to clause 17 which confers immunity from suit after the expiration of one year "after the delivery of the goods or the date when they should have been delivered". We were referred to decisions in which clauses limiting the time within which action may be brought have been treated as exception clauses for the purposes of the doctrine /Chitty on Contracts (23rd); Atlantic Shipping Co.Ltd. v. Louis Dreyfus & Co. (1922) A.C. 250; Smeaton Hanscomb & Co.Ltd. v. Sassoon I, Setty Son & Co. (No.1) (1953) 1 W.L.R. 1468/. It was argued that once the stevedore was held to be in fundamental breach, there was no reason why clause 17 should be treated differently from clauses 2 and 5. But with respect, this submission treats the doctrine as a rule of law, a view which has now been exploded /Suisse Atlantique supra at 392, 399, 400, 410, 425-6, 431-2/, instead of treating it as a rule of construction. /Thomas National Transport (Melbourne) Proprietary Limited & Anor v. May & Baker (Australia) Pty.Ltd. (1966) 115 C.L.R. 353 at 376/. There is therefore no rule of law which stipulates that a party in fundamental breach forfeits the protection of all exception clauses. The protection will only be lost if the fundamental breach is of such a character that the application to it of a given exception clause would defeat the whole purpose of the contract. I am not persuaded that the contractual substratum of the contract of sea carriage would be destroyed if liability for the wrongful delivery of goods to a person who had no documents were to become unenforceable after the lapse of twelve months. The plaintiff

In the Supreme Court of New South Wales Court of Appeal

No.5 Reasons for Judgment of His Honour Mr. Justice Glass

19th August 1976

(continued)

in other words has not shown that the modification by implication of the language used in clause 17 so as to exclude fundamental breaches is necessary to give effect to what the parties must be understood to have intended /H. & E. Van Der Sterren v. Cibernetics (Holdings) Pty.Ltd. 44 A.L.J.R. 157 at 158/.

It was also submitted that the carrier's responsibility under the bill of lading came to an end when the goods were unloaded and that as a consequence the responsibility and protection of the stevedore thereunder had also ceased. It was acknowledged that there was a plain inconsistency between this argument and the submission of fundamental breach depending as the latter did upon the obligation of the stevedore to deliver only in exchange for documents. In my opinion the argument is without substance. It was exhaustively examined by the trial judge. I would with respect adopt his reasons for rejecting it.

For these reasons I would propose that the appeal be allowed and that judgment be entered in favour of the plaintiff in the sum of $14,684.98. As the plaintiff has succeeded only on a point not taken below, I consider that the costs of the trial and the appeal should be reserved for further argument.

I certify that this and the Nine preceding pages are a true copy of the reasons for judgment of The Honourable Mr. Justice Glass

Sd. Margaret G.Newby
Associate

Date 19.8.76

IN THE SUPREME COURT) C.A. No. 256 of 1975
OF NEW SOUTH WALES) C.C. No.5033 of 1971
COURT OF APPEAL)

In the Supreme Court of New South Wales Court of Appeal

No.5
Reasons for Judgment of His Honour Mr. Justice Mahoney

19th August 1976

CORAM: HUTLEY, J.A.
GLASS, J.A.
MAHONEY, J.A.

Thursday, 19th August 1976

SALMOND & SPRAGGON (AUSTRALIA) PTY.LIMITED

v.

10 JOINT CARGO SERVICES PTY. LIMITED & ANOR.

JUDGMENT

MAHONEY, J.A. : I concur in the orders proposed.

I hereby certify that the preceding pages are a true record of the reasons for judgment of His Honour Mr.Justice Mahoney

20 Sd: B.L.Levy
Associate

Date: 19.8.76

In the Supreme Court of New South Wales
Court of Appeal

No.6
Order
19th August 1976

No. 6

ORDER - 19th August 1976

IN THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

C.A. No. 256 of 1975
C.C. No. 5033 of 1971

SALMOND & SPRAGGON (AUSTRALIA) PTY.LIMITED
Plaintiff (Appellant)

JOINT CARGO SERVICES PTY. LIMITED
First Defendant

10

PORT JACKSON STEVEDORING PTY.LIMITED
Second Defendant (Respondent to Appeal)

ORDER

THE COURT ORDERS that -

1. This Appeal be allowed and there be a verdict in favour of the appellant against the second defendant in the sum of $14,684.98.

2. The costs of the trial and of the appeal be reserved for argument.

20

Ordered 19th August, 1976 and entered 14th February, 1977.

Sd:

REGISTRAR

No. 7

REASONS FOR JUDGMENT
OF THE COURT - 8th
October 1976

In the Supreme Court of New South Wales Court of Appeal

No.7
Reasons for Judgment of the Court
8th October 1976

IN THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

C.A. No. 256 of 1975
C.C. No. 5033 of 1971

CORAM: HUTLEY, J.A.
GLASS, J.A.
MAHONEY, J.A.

10

Friday, 8th October 1976

SALMOND & SPRAGGON (AUSTRALIA) PTY.LIMITED

v.

JOINT CARGO SERVICES PTY. LIMITED & ANOR.

JUDGMENT OF THE COURT

We have considered the written submissions of the appellant and the respondent to the appeal on the question of costs, and are of the opinion that the appellant should have its costs of the appeal and the respondent a certificate under the Suitors' Fund Act.

20

As for the trial before Sheppard J., we are of the opinion that this is an appropriate case for a 'Bullock' order and the appellant should receive from the respondent the costs which it has been ordered to pay the first defendant, Joint Cargo Services Pty. Limited.

We are further of the opinion that the appellant should not have the whole of its costs of the trial as, amongst other reasons, this point upon which it won in the Court of Appeal was formally but not substantively taken. We order that the respondent pay three-quarters of the appellant's costs of the trial.

30

An opportunity was given to the appellant to make written submissions that it should receive interest on the sum claimed pursuant to s.94 of the Supreme Court Procedure Act. This opportunity was not taken and we make no order that interest should be paid.

In the Supreme Court of New South Wales
Court of Appeal

No.7
Reasons for Judgment of the Court

8th October 1976

(continued)

I certify that this preceding page is a true record of their Honours reasons for Judgment

Sd:

Associate

8/10/76

No.8
Order

8th October 1976

No. 8

ORDER - 8th October 1976

IN THE SUPREME COURT) C.A.No. 256 of 1975 10
OF NEW SOUTH WALES) C.C.No. 5033 of 1971

SALMOND & SPRAGGON (AUSTRALIA) PTY.LIMITED
Plaintiff (Appellant)

JOINT CARGO SERVICES PTY.LIMITED
First Defendant

PORT JACKSON STEVEDORING PTY.LIMITED
Second Defendant
(Respondent to Appeal)

ORDER

THE COURT ORDERS that - 20

1. The respondent pay the appellant's costs of the appeal and have a certificate under the Suitor's Fund Act.

2. The respondent pay the costs which the appellant was ordered to pay the first defendant, Joint Cargo Services Pty. Limited, and three-quarters of the appellant's costs of the hearing.

Ordered 8th October, 1976, and entered 14th February, 1977. 30

Sd:
REGISTRAR

In the High Court of Australia

No.9 Notice of Appeal (No.154 of 1976)

8th September 1976

No. 9

NOTICE OF APPEAL (No.154 of 1976) 8th September 1976

IN THE HIGH COURT OF AUSTRALIA)
PRINCIPAL REGISTRY) No.154 of 1976

On appeal from the Court of Appeal of the Supreme Court of New South Wales

BETWEEN:

10 PORT JACKSON STEVEDORING PTY. LIMITED

Appellant(Defendant)

AND :

SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED

Respondent (Plaintiff)

NOTICE OF APPEAL

TAKE NOTICE that the Appellant herein appeals to the High Court of Australia against the whole of 20 the judgment of the Court of Appeal of the Supreme Court of New South Wales of the 19th August, 1976 in matter No. Court of Appeal No.256 of 1975 between the Appellant and Respondent by which the appeal was allowed a verdict in favour of the Respondent against the Appellant in the sum of $14,684.98. Costs of the trial and of the Appeal reserved for argument upon the following grounds:-

1. The Court of Appeal has in error :-

(a) In permitting the Respondent to contend 30 upon the appeal that consideration had not moved from the Appellant so that in its absence the Appellant was not entitled to invoke the protective clauses in the Bill of Lading.

(b) In finding that consideration had not moved from the Appellant so that in its absence the Appellant was not entitled to invoke the protective clauses of the Bill of Lading.

40 2. The Court of Appeal should have held :-

In the High Court of Australia

No.9
Notice of Appeal (No.154 of 1976)

8th September 1976

(continued)

(a) That the Respondent was not permitted to contend upon the appeal that consideration had not moved from the Appellant.

(b) Alternatively, that consideration had moved from the Appellant.

3. That the Court of Appeal has in error in holding that the Appellant's negligence caused the loss of the goods in that its system and that the manner of performance or non-performance of the duties of its servants made the theft possible. 10

4. The Court of Appeal should have held :-

(a) That the acts or omissions of the Appellant as aforesaid did not cause the loss of the goods.

(b) In the alternative, if the Appellant's acts or omissions should be characterised as negligent such characterisation does not preclude the Appellant from relying upon clause 2 of the Bill of Lading. 20

5. That the Court of Appeal has in error in distinguishing the decision of the Privy Council in the Eurymedon (1975) A.C. 154.

6. The judgment of the Court of Appeal was wrong in law as being against the evidence and the weight of evidence.

AND FURTHER TAKE NOTICE that the Appellant seeks the following orders in lieu of those appealed for. 30

1. That this appeal be allowed.

2. That the verdict and judgment of the Court of Appeal be set aside.

3. That verdict be given for the Appellant, judgment accordingly, or alternatively, a new trial be granted.

4. That the Respondent pay the Appellant's costs of this appeal.

DATED this 8th day of September, 1976. 40

Sd:
Solicitor for the Appellant
187 Macquarie Street,
Sydney, N.S.W. 2000

No. 10

NOTICE OF APPEAL
(No.189 of 1976)
28th October 1976

In the High Court of Australia

No.10
Notice of Appeal (No.189 of 1976)
28th October 1976

IN THE HIGH COURT OF AUSTRALIA)
PRINCIPAL REGISTRY) No.189 of 1976

On Appeal from the Court of Appeal of the Supreme Court of New South Wales

10 **BETWEEN** :

PORT JACKSON STEVEDORING PTY. LIMITED
Appellant (Defendant)

AND :

SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED
Respondent (Plaintiff)

NOTICE OF APPEAL

TAKE NOTICE that the Appellant herein appeals
20 to the High Court of Australia against the whole of the judgment of the Court of Appeal of the Supreme Court of New South Wales of 8th October, 1976 in matter No. Court of Appeal No. 256 of 1975 between the Appellant and the Respondent by which the Appellant was ordered to pay the Respondent's costs of the Appeal and to have a certificate under the Suitor's Fund Act. Appellant to pay the costs which the Respondent was ordered to pay the first defendant, Joint
30 Cargo Services Pty. Limited, and three-quarters of the Respondent's costs of the hearing upon the following grounds :-

1. The Court of Appeal was in error in exercising its discretion in the terms set out in the Order;

2. As the Court of Appeal found that the point upon which the Respondent was successfuly sic before it had been formally but not substantively taken before the
40 learned Primary Judge, it should not have made the ORDER in the terms set out above;

3. That the judgment of the Court of Appeal of

In the High Court of Australia

No.12 Reasons for Judgment of Barwick, C.J.

3rd April 1978

(continued)

Two questions have therefore to be dealt with: first, whether, whatever the scope of clauses 2 and 17, the appellant had become a party to them and, secondly, whether the clauses included in their scope the activities of the carrier in removing consignments from the ship's tackles into store, there sorting and stacking them, and ultimately delivering them to consignees, and those activities when carried out by an independent stevedore engaged by the carrier if the carrier did not itself do such work. 10

Their Lordships in The Eurymedon adopted the dicta of Lord Reid in Scruttons Ltd. v. Midland Silicones Ltd., 1962 A.C. 446 at p.474. This adoption clearly lays down that the stevedore discharging the ship was entitled to the benefit of clauses such as clauses 2 and 17 in the present bill of lading if, (1) the bill of lading made it clear that the carrier intended by its terms to protect the stevedore, (2) the carrier by the bill contracted for the stevedore's protection as well as for his own, (3) the authority of the carrier to act for the stevedore in this respect whether antecedently or by ratification was made out, and (4) that there was consideration moving from the stevedore. 20

At the trial of the present action, the first two and the last of these requisities were conceded by the respondent, though the third was contested. The learned trial judge, however, found that the appellant had ratified the agreement made by the carrier on its behalf. Accordingly, as I have said, judgment was given for the appellant. 30

The terms of clause 2 make it abundantly clear that the carrier purported to contract with the consignor for independent contractors it might engage to handle the consignment. I use the verb "handle" in this connection in a neutral sense. Exactly what activities of the stevedore are to be included in it is the additional question which I have to discuss. Thus items (1) and (2) above were in my opinion properly conceded at the hearing of the action. 40

The appellate court, having reviewed the evidence, found that "the carrier in bargaining for the protection of (the) stevedore was acting with the appellant's authority", i.e. 50

with its antecedent authority. In my opinion, this was a correct conclusion of fact. Upon that finding, confirming though on a different basis the conclusion of the learned judge, coupled with the concessions made at the hearing, the defence of the appellant was complete.

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However, although the contrary was conceded at the trial, the respondent (the appellant before the appelate court) sought to submit to that court that there was no consideration shown to be moving from the appellant to support in its favour the benefit of clauses 2 and 17 of the bill of lading. The appellate court gave express leave to rely on this submission "once it was conceded by the (appellant) that its case at the trial would not have been differently presented if the point had been specifically taken". Before us, the accuracy of this quoted statement of the appellate court was challenged by counsel for the appellant. Having regard to the decision on the substance of this appeal at which I have come, I find no need to resolve that matter. Suffice it to say it should only be in the clearest case and for the most cogent reasons that a party who has conceded matter at trial should be allowed to make the validity of what has been conceded the basis for overturning the result of the trial.

The appellate court, having allowed the point to be raised before it, thereafter decided it against the appellant. This Court must now deal with it.

As appears from the passage quoted below, the appellate court in reaching its conclusion treated the case as one in which an offer at large had been made requiring acceptance by an act done as an acceptance of that offer.

The appellate court found that it had not been established that the appellant had accepted the offer or given consideration to support the agreement with the consignor which it claimed had been made by means of the bill of lading and its own activity in discharging, sorting and stacking the shipment in question. The relevant passage in the judgment of Glass J.A., which received the

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assent of the other members of the appellate court, is as follows :

> "The plaintiff" (the respondent) "then submits that although the stevedore's knowledge of the exempting offer could be inferred, there is no evidence that in performing its stevedoring functions it did so in reliance upon the offer. There was tendered in evidence a document headed 'Port Jackson Stevedoring Pty. Limited: Basic Terms and Conditions for Stevedoring at Sydney N.S.W.' It sets out the conditions of employment and rates of remuneration which applied to work undertaken by the stevedore for shipowners in the port of Sydney. The document formed part of Exhibit G together with a letter from the stevedore's solicitors stating that the stevedore was employed by the carrier upon terms which accorded with the document. These two documents plus the evidence that the stevedore unloaded the plaintiff's goods and stowed them in its shed constitute the whole of the material bearing upon this issue. For reasons already given his Honour was not called upon to decide it. It is necessary for this Court to decide whether this evidence measures up to the requirements of the fourth condition. I am not satisfied that it does. I find that the stevedore knew of the shipper's offer to exempt. But it was bound to carry out stevedoring operations under its contract. For all that appears there may have no relationship whatever between the conduct of the stevedore and its knowledge of the offer (Australian Woollen Mills Pty.Ltd. v. The Commonwealth (1953-54) 92 C.L.R. 424 at 457). It is quite consistent with the facts proved that the stevedore acted as it did solely because of the contract it had made with the carrier. For these reasons I conclude that there is a fatal gap in the stevedore's proofs of the fourth condition on which the Eurymedon doctrine depends."

From this quotation of their reasons it will be observed that the appellate court accepted the view that the bill of lading, in relation both to the activities of the carrier and those of the stevedore was intended to govern those activities taking place after the

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consignment had left the ship's tackles. It said that an argument to the contrary was without substance. Indeed clause 5 of the bill of lading, which I have set out, expressly relates to activities of the carrier "continuing after the goods had left the ship's tackles". It was said in that clause that in respect of such activities the carrier would be regarded as an ordinary bailee. I shall return later to deal with the suggestion that the bill of lading intended to cover only the activities of carrier and stevedore up to the time of delivery of the consignment by the ship, i.e. until the consignment was placed overside on the wharf free of the ship's tackles. Meantime, I shall express my views upon the ground on which the appellate court decided in favour of the respondent.

The analysis of the situation which arose on the consignor's acceptance of the bill of lading covering the shipment which found favour with the appellate court is, in my opinion, erroneous. It led that court to look for an act of the stevedore in intended acceptance by the stevedore of a standing offer contained or made in the bill of lading.

I proceed to develop my own view of the consequence of the issue to and acceptance by the consignor of the bill of lading containing the clauses I have quoted. From this my divergence from the basis of the appellate court's decision will become apparent.

As the authority of the carrier to make with the consignor an arrangement for the benefit of the appellant was made out, it cannot be doubted, in my opinion, that the carrier acted with the authority of the appellant as its agent to make an arrangement with the consignor for the protection of the appellant, as an independent contractor participating in the handling of the cargo, again using 'handling' in a neutral sense. To that arrangement there were two parties, the consignor and the appellant. By later accepting the bill the consignee became party to the arrangement with the consignor. I can see no validity in a suggestion that the bill of lading could not at the one time contain a contract of carriage between the consignor and carrier and an arrangement between consignor and stevedore, made through the

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agency of the carrier, to regulate the relationship of consignor and stevedore, when the stevedoring work was undertaken.

For my part, I find no difficulty in interpreting the arrangement made by the bill of lading and its acceptance by the consignor as provided that if, in fact, the appellant stevedored the cargo, leaving aside for the moment what the stevedoring involved, the appellant should have the benefit of the clauses of the bill including the benefit of the time limitation expressed in clause 17 of the bill of lading. I am unable to treat the clauses of the bill of lading as in any respect an unaccepted but acceptable offer by consignor to stevedore. Indeed, I do not think the bill can be interpreted as containing an offer at large by the consignor. The consignor and the appellant as stevedore were ad idem through the carrier's agency upon the acceptance by the consignor of the bill of lading as to the protection the stevedore should have in the event that it stevedored the consignment. But this consensus lacked the essential of consideration. The appellant through the bill of lading made no promise to stevedore the cargo. Thus, whilst I would not analyse the situation obtaining on the acceptance of the bill of lading as an exchange of promises, I would not analyse it as merely the making of an offer susceptible of acceptance by an act of the stevedore done in purported acceptance of the offer. For this reason I have described the bill of lading in so far as the carrier there purports to act for the appellant as an arrangement. To agree with another that, in the event that the other acts in a particular way, that other shall be entitled to stated protective provisions only needs performance by the doing of the specified act or acts to become a binding contract. Whether or not the arrangement is susceptible of unilateral disavowal before the stated act is done need not be discussed. Here the act was done. The performance of the act or acts at the one moment satisfied the need for consideration and attracted the agreed terms. For myself, and with due respect to those who find comfort in them, I find the descriptions "unilateral and bilateral" or "mutual" unhelpful in the resolution of this case. Indeed, the use of them seems to assume that they are mutually exclusive terms and together cover all possibilities. But I do not think they do. Indeed, this bill of lading, as I read it, indicates

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in my opinion that they do not. As I see it, we have here an arrangement, a compact with agreed conditions to attend the performance of certain acts, which are not promised to be done. True enough that, until such performance, the consensus has nothing upon which to operate. But that is its essential characteristic, to provide an agreed consequence to future action should that action take place: to attach conditions to a relationship arising from conduct. If one desires to use the terms, it could be said that the arrangement is mutual: it is bilateral: to it there are two parties both agreeing to the terms of the intended consequence, on the one hand the consignor and on the other the stevedore acting through its authorised agent, the carrier. The performance of the contemplated act both supplies the occasion for those conditions to operate and the consideration which makes the arrangement contractual. The document containing the basic terms and conditions for stevedoring at Sydney to which I earlier referred is another instance of an arrangement made between parties to regulate their relationship in the event that one of them in fact became the stevedore of the other's ship. Neither promised the other anything: the ship did not engage to employ the stevedore or the stevedore to discharge the ship and stevedore its cargo.

The arrangement in the bill of lading thus being one between consignor and stevedore effected through the authorised agency of the carrier, questions as to how far, if at all, someone not a party to a contract, but for whose benefit it is made, can enforce the agreement made between others, do not arise. Cases such as Tweedle v. Atkinson (1 B. & S. 393; 121 E.R. 762) and other cases listed in the notes to paragraphs 315 and 329 of Halsbury's Laws of England, Vol.9, 4th edition, have no place, in my opinion, in the resolution of the question whether the appellant was a party to the arrangement in the relevant clauses of the bill of lading. The decision in The Eurymedon made the stevedore a party to the relevant parts of the bill of lading. It is, in my opinion, that feature of the decision which is so significant and important for the commercial community, particularly that section which is concerned with the transport of goods.

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It is significant that in Lord Reid's four requisites in Scruttons Ltd. v. Midland Silicones Ltd., the third is the authority of the carrier whether antecedent or by ratification to contract with the consignor as the stevedore's agent in or through the bill of lading. His Lordship's reference in that case to consideration must be a reference to a consideration moving from the stevedore to support what the carrier as agent has arranged on the stevedore's behalf with the consignor. There is no room, in my opinion, in his Lordship's statement of the requisite elements for an offer, particularly an offer at large, of a promise for an act, th act to be done in acceptance of the offer. Clearly, the carrier was not authorised to make an offer by the stevedore to act as such. But, even if that had been so, it would have been the stevedore's offer: not an offer to the stevedore which it needed to accept. Nor can it be said that the consignor, by accepting the bill of lading, engaged the appellant to stevedore the shipment. His Lordship must have been requiring a consideration to support a consensus or arrangement already in existence.

Consequently, in my opinion, the passage from the judgment of Glass, J.A., which I have quoted, mistakes the function of consideration in the decision in The Eurymedon and in the remarks of Lord Reid in Scruttons Ltd. v. Midland Silicones Ltd. It further follows, it seems to me, that the remarks of this Court in Australian Woollen Mills Proprietary Limited v. The Commonwealth, 92 C.L.R. 424 at p.457, have not been properly applied. In this case, it is found as a fact that the carrier, in making the agreement with the consignor through the bill of lading, was indeed contracting for itself and also for the stevedore and with its antecedent authority. There is thus, in my opinion, in this case no need for the stevedore to prove that he was acting on an offer otherwise not accepted in order to establish the existence of an agreement with the consignor. The consensus existed on the consignor's acceptance of the bill apart altogether from any subsequent conduct on the part of the stevedore. It resulted from the carrier's action on behalf of the stevedore and with its authority. This situation is, in my opinion, in high contrast to those in The Crown v. Clark, 40 C.L.R. 227 and Australian Woollen Mills Proprietary Limited v. The

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Commonwealth. In those cases, what was considered was an offer to be accepted by conduct, a recognised manner of creating the contractual relation by an offer of a promise for an act. Of course, in such a case, the act if done must be capable of being regarded as having been done as an acceptance of the offer. But there is a fundamental difference between providing consideration to support 10 a consensual arrangement otherwise made and the acceptance by performance of an act of an offer not otherwise accepted. It seems to me that because their Lordships of the Privy Council in The Eurymedon recognised this distinction, there is no elaboration in their reasons for their advice in that case of the statement that consideration had been provided by the stevedore. Clearly, their Lordships declined to regard the agreement of the 20 consignor made through the bill of lading and the activity of the stevedore as gratuitous. Referring to the facts of the case, their Lordships said, at p.167, "The carrier assumes an obligation to transport the goods and to discharge at the port of arrival. The goods are to be carried and discharged, so the transaction is inherently contractual. It is contemplated that a part of this contract, viz. discharge, may be performed by 30 independent contractors - viz. the appellant. By clause 1 of the bill of lading the shipper agrees to exempt from liability the carrier, his servants and independent contractors in respect of the performance of this contract of carriage. Thus, if the carriage, including the discharge, is wholly carried out by the carrier, he is exempt. If part is carried out by him, and part by his servants, he and they are exempt. If part is carried out by 40 him and part by an independent contractor, he and the independent contractor are exempt. The exemption is designed to cover the whole carriage from loading to discharge, by whomsoever it is performed: the performance attracts the exemption of immunity in favour of whoever the performer turns out to be."

Their Lordships did prefer a particular theoretical explanation of the commercial result which they held followed from the 50 "Himalaya" clause on the performance by the appellant in that case of acts of stevedoring. They said, at pp.167-8, "that which their Lordships would accept is to say that the bill of lading brought into existence a bargain

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initially unilateral but capable of becoming mutual, between the shipper and the appellant, made through the carrier as agent. This became a full contract when the appellant performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading." 10

This analysis is in line with what I have written, though for my part I find mutuality in the acceptance by the consignor of the bill of lading, but not of course mutuality of promises. The mutuality is, as I have said, as to the consequence of the performance of stevedoring activity in relation to the shipment should it occur. Also the description of what follows on that performance is called by their Lordships "a full contract" by which 20 I take them to mean an agreement supported by consideration and thus a contract strictly so-called as distinct from an agreement or arrangement lacking consideration moving from the relevant party.

I would add, however, if contrary to my own opinion the result of the acceptance by the consignor of the bill of lading, containing the "Himalaya" clause, were properly analysed as the making of an offer by the consignor 30 susceptible of acceptance by the doing of the work, I should be of opinion that it was established in this case that the appellant had accepted the offer. The knowledge by the stevedore of the terms of the bill, of the ship's manifest and its usual employment in discharging and stevedoring the Blue Star ships would, in my opinion, require the conclusion that the acts of the appellant were done in relation to the bill containing the 40 "Himalaya" clause.

The relationship between the carrier and the stevedore was of long standing. The use of a bill of lading for consignments to Australia containing a "Himalaya" clause was well known between them. The ship's manifest would disclose to the stevedore the shipment in question and the identity of the consignor. The stevedore, in fact, removed from the ship's side into store, sorted and stacked the 50 consignment. Charges for stacking and storing were presented to and paid by the consignee through the ship's agent. In the ordinary

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course, the goods would have been delivered to the consignee against presentation of the bill of lading. I would find it extremely difficult to fail to conclude in those circumstances that in stevedoring the shipment the stevedore was responding to the terms of the bill of lading, accepting both its obligations and seeking the benefit of its restrictions.

10 I would therefore conclude that the appellate court was in error upon the ground on which it based its conclusion in favour of the respondent.

Before dealing with the question as to the scope of the clauses 2 and 17 of the bill of lading I ought to note the argument actually put forward by the respondent in support of the dismissal of the appeal. Particular attention was called to the evidence as to 20 how the goods came to leave the possession of the appellant. A servant of the appellant handed the 33 cartons of razor blades to a person who had no authority to receive or to take them. The appellant's servant did so apparently under the belief that that person held papers which he would exhibit to another servant of the appellant before removing the goods finally from the wharf and that those papers entitled the person to whom the goods 30 were given to take delivery of and to remove them. But in fact that person was a thief and due to a weakness in the appellant's system of control of the custody and delivery of goods in its possession, the thief was able to receive the goods and by his own audacity to elude the customs officers at the gate of the wharf. The trial judge found that the appellant was negligent both in the adoption of a system which inadequately guarded against such an 40 event as did occur and also in the manner in which its servants had operated the system in fact adopted by the appellant.

It was on the particular circumstances of the delivery of the goods that the respondent built its argument. It was emphasised that the appellant having taken possession of the goods ex the ship's slings was a bailee of them. Indeed, as I have said, the respondent sued the appellant as a bailee for reward. It 50 was then said upon its true construction clause 17 of the bill of lading was limited to protect the stevedore against failure properly to carry

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out the obligations of a bailee. It was said that by handing the goods over to a person who is not authorised to receive them was not a negligent act in the performance of the obligation of a bailee but rather an act which stood outside the contract of bailment, as well as I understand the argument. In this connection, much reliance was placed upon some of the reasoning in the Court's decision in The Council of the City of Sydney v. West (West's Case), 114 C.L.R. 481, particularly at pp.488-489. It was in the course of presenting this argument that counsel for the respondent expressly conceded that if it could properly be said that the goods were lost through the negligent performance of the bailee's obligations the case would fall within the operation of clauses 2 and 17 of the bill of lading so as to entitle the appellant to succeed.

But, in my opinion, the citation from West's Case does not support the respondent's proposition. In West's Case the contract of bailment was express and was construed in its protective clauses as in substance confined to acts done in the course of garaging the car. Consequently, the protective clause did not extend to cover the delivery of the car to someone other than the bailor or at his direction. Here the time limitation clause, if applicable, is universal in its scope. It opens with the words "in any event". It is not directed to protection from loss or damage of the goods as earlier clauses are. It is directed only to the time within which proceedings should be commenced. The endeavour of the respondent to limit the generality of clause 17 by what counsel conceded was a narrow construction was, in my opinion, misconceived.

But in any case, in my opinion, the act of the appellant's employee in handing over the goods, though negligent in the circumstances, was in purported performance of the obligation of the appellant as bailee. One of its obligations was to deliver the goods but of course to the consignee or its order. In my opinion, it matters not in this case whether the act of handing over the goods be described as an unauthorised delivery, a misdelivery or a delivery resulting from the negligence of the appellant as the bailee of the goods. Subject to the question as to the scope of the clauses of the bill of lading, in my opinion

the fault of the appellant fell fairly within the terms of the clauses of the bill of lading.

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I now turn to the final question, namely, whether upon its proper construction did the contract made between the consignor and the stevedore through the agency of the carrier and the acts of the stevedore apply only to acts of the stevedore done in the performance of the carrier's obligation to carry out and to deliver ex slings?

First, I must notice that the event which gave rise to liability in the stevedore in The Eurymedon occurred before the ship's obligation to deliver had been performed. Thus the stevedore at the time of that event was executing on behalf of the carrier part of the contract of carriage. Here the event giving rise to liability in the stevedore occurred after the carriage by the ship was complete (at least theoretically) but before the consignee had obtained delivery of the consignment. Thus it can properly be said that their Lordships' decision related in terms only to the period of carriage. But their Lordships in expressing themselves did not use any language which would confine the principle of their decision to the activities of the stevedore up to the time the goods became free of the ship's tackle. Indeed, it might be said that there is some ambiguity in their Lordships' use of the word "discharge" used as if distinct from "carriage" at p.167 of the report. Carriage is not complete till the goods are ex slings. Thus it is possible to treat the word "discharge" as covering the on movement of the goods into store. But I am content in disposing of this appeal not to ground anything upon this possible ambiguity.

Their Lordships' decision in The Eurymedon was of great moment in the commercial world and, if I may say so, an outstanding example of the ability of the law to render effective the practical expectations of those engaged in the transportation of goods. It is not a decision of its nature to be narrowly or pedantically confined. It established, as I have said, that the acceptance of the bill of lading by the consignor followed by the acts of the stevedore produced a binding contract to which consignor and stevedore were parties. If I may say so, I entirely and most respectfully

agree with their Lordships' decision and I have indicated my own explanation, not disconformable to that adopted by their Lordships, of the legal justification for it.

The proper construction of the relevant clauses of the bill to determine whether the agreement covered the stevedoring following the removal of the goods from the ship's tackle remains to be considered.

The consignee by accepting the bill, of course, accepts the situation which has been created between consignor and stevedore and becomes in substance a party to the conditions of the bailment. The ship's obligation as the carrier under the bill of lading is to deliver ex slings on arrival at the stipulated port. The consignee is obliged to take delivery at the ship's side when the goods are free of the ship's tackles. See clause 8 which provides for demurrage if the goods are not taken from the ship's side. But, of course, it is in general quite impractical for consignees to do so in the ordinary course of the discharge of a ship: and delivery of consignment carried by a general cargo ship is rarely, if ever, taken at the ship's side. 10 20

The practice of handling goods discharged from a vessel carrying general cargo was not evidenced in the case. However, I think judicial knowledge of that practice extends to a sufficient degree to warrant the following description of the course followed in handling general cargo on its being off-loaded from the carrying ship. 30

The goods on the ship's manifest are progressively brought to the wharf where the ship berths alongside, as was the case with the "New York Star". Both the manner and place of their storage and the ship's convenience in relation to clearing its several holds influence the time at and the order in which consignments are off-loaded. Any given consignment does not necessarily come overside in one parcel or at the one time or at immediately successive times. The ship is at liberty to discharge the cargo by day and by night, and on any day of the week, Sundays and holidays included. It is necessary in the practical course of the unloading of a ship that the cargo be progressively removed from the ship's side. It could not be just left 40 50

where and as it emerged from the tackles. Generally it is placed in a shed on the wharf, or at any rate at a point well removed from the ship's side, being sorted and stacked appropriately for delivery to the various consignees. Inevitably, either the ship or a stevedore must do this work. Clearly enough, each consignee could not either attend to take his consignment or send a stevedore of his own to handle it. The practical course in general is for the stevedore who undertakes to discharge the ship to remove the cargo to store as it becomes free of the ship's tackles. Of course, the carrier may itself fill the role of stevedore instead of engaging an independent contractor to stevedore the cargo, in which case the carrier acting as stevedore removes and stores the cargo. As I have indicated, the bill of lading deals with the carrier's liability if the carrier does handle the cargo after it has left the ship's tackles. But, in general, a stevedore is engaged to unload the ship and stevedore the cargo into store.

This course of handling the consignments making up the cargo has great convenience for consignees who, as a result, need not present themselves at the precise time that their goods come overside and land on the wharf. As the stevedore attends to the removal of the goods into store, the consignee can present his bill of lading and take delivery of his goods from the hands of the stevedore out of the store at his convenience This was the course pursued by the respondent in this case.

It is apparent, therefore, that in order to facilitate the practical course of cargo handling some arrangement for the removal of the goods from the place on the wharf where they rest after release from the ship's tackles must be made before the ship's arrival. Therefore the carrier, unless it acts itself as stevedore, engages a stevedore to remove, sort and stack the cargo when it is free of the slings: and does so in advance of the arrival or expected arrival of the ship. For this there may be a standing arrangement between shipping company and stevedore: or the stevedore may be engaged ad hoc. The course of discharging cargo and of delivery through the hands of a stevedore who has removed it from the tackles and stored it, must be taken to have been known to the consignor and, at the time of acceptance

of the bill of lading, by the consignee. Thus, it must be accepted, in my opinion, as in the contemplation of consignor, carrier and, if it matters, of consignee that arrangements will most probably be made for the removal by a stevedore of consignments from the ship's side to store, unless the carrier undertakes that work not in its capacity of carrier but of stevedore. The commercial expectation is that this course will be followed and provision to cover carrier and stevedore is effected by or through the bill of lading. The means now commercially adopted to cover the onward movement of the consignment from wharf to shed and to provide the protection of a time limitation is the inclusion of appropriate provisions in the bill of lading (e.g. clauses 2 and 17 in the present bill). It was, in my opinion, in the contemplation therefore of the consignor that if the ship did not itself stevedore the cargo into store it was certain that a stevedore would be engaged to perform that operation.

Clause 17 in relation to the carrier's acts is clearly universal in terms, so that it clearly applies to the acts of the carrier as bailee in itself stevedoring the goods from ship's tackles to store, etc. If the clause covers the carrier when acting as stevedore and bailee of the goods, as in my opinion it does, I am unable to discover any reason why it should not cover the independent stevedore in the movement of the cargo. There can, in my opinion, be no justification for refusing to give the carrier the benefit of clause 17 in respect of its own acts or omissions as bailee of the goods following upon their removal from the ship's side. To confine the scope of the agreement with the stevedore to a period ending with the discharge of the goods from the ship's tackles is not only seriously to limit the efficacy of the clauses of the bill of lading and to defeat the reasonable commercial expectation of the consignor and carrier, but it is in my opinion an unwarranted interpretation of the language of the bill of lading. I am unable to discover any reason why it should not cover the independent stevedore in the on movement of the cargo.

I should add that the stevedore in discharging the cargo and in stevedoring it into store is not acting as the agent of the ship. It is an independent contractor, itself a bailee of the goods, the terms of the bailment including the relevant clauses of the bill.

Thus, in my opinion, the principle on which The Eurymedon was decided and the clauses of the bill properly construed covered the situation in this case and required that the judgment of the primary judge be supported.

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Two matters might be mentioned in conclusion. It is to be noticed that some emphasis was placed in the passage from the reasons for judgment of the appellate court
10 which I have quoted upon the existence of the document headed "Port Jackson Stevedoring Pty.Ltd. Basic Terms and Conditions for Stevedoring at Sydney, N.S.W.". As I have indicated this document was not, in truth, an agreement to stevedore but determined the terms and conditions upon which stevedoring might take place. It appeared in the evidence that the ship's agent, Joint Cargo Services, engaged the appellant on behalf of the carrier to act as
20 stevedore in connection with the discharge of the ship carrying the consignment and in the handing over of cargo to consignees. But the existence of an employment by the carrier of the appellant as a stevedore, even if antecedent to the making of the arrangement on its behalf through the bill of lading, in my opinion, was irrelevant to the question sought to be decided. As long ago as 1861 it was decided in Scotson & Ors. v. Pegg, 6 H & N 295, 158 E.R. 121, the
30 performance by a stevedore of his duties as such should be regarded as consideration for a promise by the consignor of a shipment although the stevedore may have been bound as between itself and the carrier, the shipping company, to stevedore those goods in the very manner in which it had done so. I might add that if the situation is analysed as I have done, i.e. as an arrangement as to the consequence of acts if subsequently done, the existence of the
40 said document is even less significant.

In the course of the case, both at trial and before the appellate court, there was discussion as to whether or not those parts of clause 2 which purported to exempt the carrier and the independent contractor from all liability for breach of obligation were enforceable. Having regard to my expressed view as to the availability to the stevedore of the time limitation contained in clause 17 there is
50 no need for me to examine the question whether the exempting clauses were available in whole or in part to protect it against all liability. On these matters I express no opinion. There are

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No.12 Reasons for Judgment of Barwick, C.J.

3rd April 1978

(continued)

obvious differences between the operation of time limitation clauses and of clauses which purport to displace liability. Suffice it to say that I see no reason in principle or authority why clause 17, however strictly construed, should not be held to be enforceable according to its terms and effective to bar the respondent's action.

In my opinion, the appeal should be allowed and the judgment for the appellant entered by the primary judge restored. 10

Sd: G. Barwick

This page and the preceding thirty-one pages represent my reasons for judgment in Port Jackson Stevedoring Pty. Limited v. Salmond and Spraggon (Australia) Pty. Limited.

Reasons for Judgment of Stephen, J.

3rd April 1978

REASONS FOR JUDGMENT OF STEPHEN, J.

PORT JACKSON STEVEDORING PTY. LTD.

v.

SALMOND & SPRAGGON (AUSTRALIA) PTY.LTD. 20

The appellant stevedore, when sued in the Supreme Court of New South Wales by the consignee of goods stolen from a wharfside warehouse, relied upon a time limitation provision contained in the bill of lading issued by the carrier to the shipper. It contended that the terms of cl.2 of that bill of lading conferred upon it the benefit of that time limitation. Clause 2 is in all material respects identical to the clause which, in New Zealand Shipping Co.Ltd. v. A.M. Satterthwaite & Co.Ltd. (The Eurymedon) /1975/ A.C.154, a majority of their Lordships found to confer immunity upon a negligent stevedore, although not a party to the bill of lading. 30

The stevedore succeeded at first instance, Sheppard J. applying the decision in The Eurymedon. The consignee's appeal to the New South Wales Court of Appeal succeeded upon an argument which had not been advanced before Sheppard J. Because the stevedore, although knowing of the promised immunity contained in the bill of lading, was not shown to have relied 40

upon it when it performed its work of discharging the ship, the Court of Appeal held that the unloading of the goods by the stevedore did not provide any consideration for the shipper's promise. The stevedore now appeals to this Court.

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I would dismiss the appeal, but for reasons other than those which found favour with the Court of Appeal. In my view, the
10 loss of the goods occurred at a time when the stevedore was no longer acting in performance of any of the carrier's obligations under the bill of lading. The benefits of cl.2, if ever available to the stevedore, had for that reason ceased to apply and could no longer be availed of by it.

Why this is so requires close examination of the bill of lading. However, I should first explain the reasons for my qualified acknowledge-
20 ment of the availability to the stevedore, in any circumstances, of the benefit of cl.2 of the bill of lading. In neither of the Courts below was the decision of the majority of their Lordships in The Eurymedon open to challenge. On the present appeal neither party has sought to cast doubt upon the correctness of what was there decided and I would not be disposed to canvass the decision were it not that my dismissal of this appeal might otherwise be
30 taken as involving the acceptance of that decision. Accordingly I will endeavour to state, as concisely as possible, why, with respect, I take a view different from that of the majority in The Eurymedon.

That case turned upon the view to be taken of the equivalent of cl.2 of the present bill of lading. The effect of these clauses is, first, to exempt the carrier's servants and agents and "every independent contractor
40 from time to time employed by the Carrier" from liability to the shipper, consignee or owner of the goods for loss or damage or delay while acting in the course of or in connexion with their employment. Every exemption and limitation to which the carrier is entitled is then expressly made available to them. Finally, "for the purpose of all the foregoing provisions" of the clause the carrier is "deemed to be acting as agent or trustee on behalf of and for the benefit
50 of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid)" all of them being

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(continued)

"to this extent" deemed to be parties to the contract in or evidenced by the bill. The latter part of the clause thus acknowledges, as between shipper and carrier, that the carrier is, for the purpose of what goes before, contracting as agent for each of its servant, agents and independent contractors, who are to that extent deemed to be parties to the contract with the consignor. What goes before is the conferring upon each of them of the benefit if every exemption from liability and immunity to which the carrier is entitled under the bill. But for the doctrine of consideration the legal consequence would be clear; a stevedore would be entitled to the benefit of those exemptions in the bill. 10

However, because, at the date of the bill, the stevedore at the port of discharge had as yet provided no consideration, the learned trial judge in The Eurymedon, Beattie, J., concluded that that could not be the effect in law of this clause. Nevertheless, he felt able to give the clause effective operation by readingit as an offer of immunity by the shipper to all persons of the class mentioned, including the stevedore, the carrier being their agent to receive that offer. Performance by any of them of services for the consignor was an acceptance of the offer and resulted in a unilateral contract of the familiar Carlill v. Carbolic Smoke Ball Co. ([1893] 1 Q.B. 256) type. On appeal, the members of the New Zealand Court of Appeal agreed with Beattie J. concerning the effect of the want of consideration on the part of the stevedore but unanimously rejected his alternative reading of the clause; they did not see it as involving any offer by the shipper to all persons of the class involved. The fullest statement of this approach appears in the judgment of Perry J., reported in [1973] 1 N.Z.L.R. 174 at pp.184-6. The stevedore's reading of the clause, as his Honour saw it, would involve an offer by the shipper addressed to all the carrier's servants, agents and independent contractors, and capable of acceptance by an infinite variety of acts of performance. His Honour regarded such an interpretation as neither reflecting the parties' intention nor as justified by any fair reading of the words of the clause, which spoke only of one contract, a concluded and specific contract evidenced by the bill of lading. 20 30 40 50

On appeal to their Lordships' Board the majority, in reversing the Court of Appeal, did

not precisely adopt in its entirety the view which had found favour with Beattie J. at first instance. The analysis which their Lordships accepted was that of a bargain made at the outset between shipper and carrier, the latter acting as agent for the stevedore. This was a bargain unilateral in character but capable of becoming mutual and in fact becoming a "full contract" when, by discharging the cargo for the shipper's benefit, the stevedore provided consideration to the shipper for the latter's agreement that the exemptions and limitations in the bill should enure to the stevedore's benefit.

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3rd April 1978 (continued)

Of the dissentients, Viscount Dilhorne viewed the clause as recording an agreement between shipper and carrier, the latter contracting both on its own behalf and on behalf of its agents, servants and independent contractors. He regarded the analyses adopted by Beattie J. and by the majority of their Lordships as each essentially requiring the clause to be construed as an offer by the shipper which the stevedore might accept, a reading of the language which his Lordship was unable to accept. Lord Simon of Glaisdale would also have dismissed the appeal, broadly for the reasons stated by the members of the New Zealand Court of Appeal. His Lordship thought that to construe the clause as an offer by the shipper was inconsistent with its express words and the absence of any stipulated mode of acceptance was, he thought, itself a fatal defect.

The genesis of The Eurymedon lies in what was said by Lord Reid in Midland Silicones Ltd. v. Scruttons Ltd /1962/ A.C.446. Lord Reid there suggested a means whereby a stevedore might possibly be given the benefit of those immunities which by its bill of lading a carrier might secure for itself as against a shipper. In all the successive judgments in The Eurymedon Lord Reid's suggestion was accepted as authoritative and the question was whether the clause in fact answered the description of what Lord Reid had suggested, in particular whether, when applied to a discharging stevedore, Lord Reid's requirement as to overcoming "any difficulties about consideration moving from the stevedore" had been satisfied. Whereas Beattie J. overcame these difficulties by discerning a Carlill-type unilateral contract, the majority of their Lordships, while acknowledging no substantially different analysis, preferred to express the

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3rd April 1978 (continued)

relationship as involving an initial "bargain" between shipper and stevedore, albeit devoid of consideration moving from the latter. That has, no doubt, the advantage that it better accords with the language of the clause, couched as it is in terms of an immediately concluded agreement but, as I would understand it, it differs from a Carlill-type unilateral contract only in that persons to whom the offer is made are present at the time of its making (in the present case, in the shape of the carrier who is their agent to receive the offer). It is their presence and their assent (if that be not too strong a word) to the making of the offer to them that enabled their Lordships to say that although no binding agreement had been concluded a "bargain" had been struck which might mature into a "complete" contract if one to whom the offer was made performs part of the work contemplated under the bill of lading and thereby, at the same time, provides consideration in exchange for the shipper's promise which is involved in the offer.

It is not surprising that there should have been difficulty in reconciling the operation of the clause with Lord Reid's earlier suggestion since, as Lord Simon of Glaisdale points out at p.183 of his dissenting judgment in Eurymedon, that form of clause was not drawn in the light of what his Lordship had said but, on the contrary, antedates Lord Reid's judgment in Midland Silicones. Indeed I would have thought, from the terms in which Lord Reid speaks in Midland Silicones, that his Lordship cannot have contemplated anything in the way of a Carlill-type unilateral contract. His Lordship speaks of the carrier "contracting as agent for the stevedore that these provisions should apply to the stevedore" and of the carrier having authority from the stevedore "to do that", words which contemplate the creation of a contract having immediate effect as binding both parties and which are as inappropriate to an orthodox Carlill-type unilateral contract as they are to the particular formulation favoured by the majority of their Lordships.

In my view cl.2, which was not designed to give effect to Lord Reid's suggestion in Midland Silicones, is not in fact capable of giving effect to it. I respectfully share with those of their Lordships who dissented and with the members of the New Zealand Court of Appeal an inability to read its words as recording anything other than a contract then and there concluded,

and which, in relation to the stevedore, necessarily falls foul of the doctrine of consideration. Nor am I, with respect, satisfied that, either in the interest of international commercial comity or upon grounds of public policy, this is a case in which the language of the parties ought to be strained in an endeavour to give it an efficacy which, according to its ordinary meaning, it does not possess.

On the score of public policy the observations of Sheppard J. at first instance are of cogency. His Honour thought it proper to refer to aspects of the evidence which had disturbed him, aspects which suggested a lack of effective supervision and perhaps a degree of irresponsibility on the part of those whose task it was to care for goods discharged in the port of Sydney. As his Honour points out, while to enable such persons to contract out of liability may reduce freight and stevedoring rates, it may also tend to increase insurance premiums for consignees. The vice lies in the relative inability of the latter, although bearing the burden of increased premiums, or of their insurers, to insist upon reasonable diligence on the part of the employees of the carrier or its contractors; they wholly lack the power to control those employees. At the same time the carrier and its contractors, in a position to exercise control and supervision, lack the incentive to do so which the sanction of increased premiums or possible liability involves. This divorcing of the power of control from any liability for the consequences of its non-exercise not only attracts that natural antipathy to exemption clauses and to the saving of "grossly negligent people from the normal consequences of their negligence", of which Fullagar J. spoke in Wilson v. Darling Island Stevedoring & Lighterage Co.Ltd.(1956) 95 C.L.R. 43 at p.71 but may also be thought to be positively undesirable in the public interest.

There is a further public policy consideration which at one and the same time bears upon the question of international commercial comity. While it is in the interests of great fleet-owning nations that their ocean carriers, and the servants and independent contractors which they employ, should be as fully protected as possible from liability at the suit of shippers and consignees, the interests of those nations which rely upon those fleets for their import and export trade is to the contrary. It was in

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response to such national interests that the United States of America and Australia, which both fell into the latter category, enacted the Harter Act of 1893 and our own Sea Carriage of Goods Act 1904, measures which circumscribed the carrier's freedom to contract out of liability. Each was more stringent than were the subsequent Hague Rules. Many nations, particularly developing nations, have come to regard those Rules as unduly favouring carriers at the expense of cargo owners, especially because of the quite restricted duration of the carrier's compulsory period of responsibility which they impose, ending as it does immediately upon discharge. It is not clear to me that Australian courts should regard it as in any way in the public interest that carriers' exemption clauses, effective before loading and after discharge, should be accorded any benevolent interpretation, either so as to benefit carriers or so as to benefit independent contractors by extending the scope of such clauses to include such contractors. If public policy does not dictate such a course, neither do considerations of comity. To read the transactions of the seminars on International Trade organized by the Attorney-General's Department is to appreciate the powerful movement among trading nations in a contrary direction, towards extension of the period during which both the ocean carrier and its land-based agents are to be denied the ability freely to exclude themselves from liability for damage to or loss of cargo. The draft Convention on carriage of goods by sea adopted at the ninth session of the United Nations Commission on International Trade Law (UNCITRAL) in 1976 provides evidence of this.

Finally, in relation to international comity, it is worth noting that uniformity is little likely to be promoted by a clause such as the present cl.2. The decision in The Eurymedon turned upon quite special facts, that the appellant stevedore not only habitually acted as such for the carrier in New Zealand but was its parent, so that, as Lord Wilberforce observed at p.167, "The carrier, was, undisputably, authorized by the appellant to contract as its agent for the purpose" of the relevant clause. It was the absence of such circumstances which recently led the British Columbia Supreme Court in Calkins & Burke Ltd. v. Empire Stevedoring Co.Ltd. /1976/ 4 W.W.R. 337 to distinguish The Eurymedon, the carrier in the Canadian case not being shown to have had the stevedore's authority to contract on its behalf. It is to be

noted that in that case the 1971 decision of the Supreme Court of Canada in Canadian General Electric Co. v. Pickford & Black Ltd. 14 D.L.R. (3d) 372, which applied to stevedores the principles in Midland Silicones, was preferred to that of The Eurymedon - see at p.350. Not only will circumstances vary from case to case but recent American experience suggests that clauses employed in U.S. bills of lading are, as might be expected, by no means uniform. In a number of recent U.S. cases the outcome, so far as concerns the ability of stevedores to rely upon exemption clauses, has varied depending upon the precise wording of the clause. Thus the decision to which Lord Wilberforce referred when he said that "Commercial considerations should have the same force on both sides of the Pacific", that of a U.S. District Court in Carle & Montanari Inc. v. American Export Isbrandtsen Lines Inc. [1968] 1 Lloyd's Rep. 260 may be contrasted with that of the U.S. Supreme Court in Krawill Machinery Corp. v. Robert C. Herd & Co. Inc. [1959] 1 Lloyd's Rep. 305 (where the bill of lading did not specifically extend protection to the stevedore), that of the U.S. Court of Appeals, Second Circuit in The Mormacstar [1973] 2 Lloyd's Rep. 485 (where the bill of lading defined "carrier" so as to include all persons rendering services in connexion with performance of the contract) and that of the U.S. Court of Appeals, Ninth Circuit in Tessler Bros. (B.C.) Ltd. v. Italpacific Line and Matson Terminals Inc. [1975] 1 Lloyd's Rep. 210 (where the bill of lading specifically referred to stevedores). In the first two of these cases the stevedores were denied the protection of exemption clauses but they gained their protection in the third.

Anything approaching uniformity of the law affecting international trade is no doubt difficult of attainment but it may be that the path to it lies rather by route of international conventions and subsequent national legislation than by the adoption of any deliberate direction in the judicial interpretation of the parties' documents in particular cases.

If, contrary to the views which I have expressed, cl.2 of the bill of lading is effective to confer immunities upon the stevedore while engaged in the actual discharge of the vessel, does it also afford protection to the stevedore after completion of discharge but

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(continued)

before a consignee has actually taken delivery of the goods and removed them from the wharf area? In the present case the loss occurred some time after discharge and while the goods were in the stevedore's custody awaiting collection by the consignee.

Clause 2 of the bill of lading is expressed to operate in favour of "every independent contractor from time to time employed by the Carrier...while acting in the course of or in connexion with his employment", the carrier's immunities being extended to such independent contractors "acting as aforesaid". It follows, I think, that only so long as the stevedore is carrying out obligations of the carrier under the bill of lading will it be entitled to the immunities of the carrier; only so long will it be relevantly employed by the carrier and be acting in the course of or in connexion with the employment to which the clause refers.

Accordingly the precise limits of the carrier's obligations under the bill of lading become critical. The opening words of the body of the bill refer to receipt of the goods for transport to the port of discharge "there to be delivered" on payment of charges, the transport of the goods being subject to "all the terms of this bill of lading"; then follow over twenty clauses of which clauses 5, 7 and 8 are of present relevance.

Clause 5 is concerned not so much with the carrier's obligations as with the limitation and, in some instances, the exclusion of its liability; it narrowly confines the carrier's responsibility "as a carrier" to the period from the loading of the goods aboard until the goods leave the ship's tackle at the port of discharge.

Clause 8 is exclusively concerned with a quite different subject matter, the mode of delivery of the goods. It provides that delivery of the goods shall be taken by the consignee from the vessel's rail immediately the vessel is ready to discharge. It goes on to provide that "Delivery ex ship's rail shall constitute due delivery of the goods described herein and the carrier's liability shall cease at that point notwithstanding consignee receiving delivery at some point removed from the ship's side and custom of the port being to the contrary." There are some obvious

infelicities in the drafting of this clause. The word "delivery" is clearly used in different senses, the reference to the consignee receiving "delivery" at some point removed from the ship's side referring to the taking of actual physical possession of the goods by the consignee or its agent.

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3rd April 1978 (continued)

However it is otherwise clear enough that the carrier's contractual obligation to deliver the goods is to be discharged by delivery ex ship's rail whether or not the consignee takes actual possession of the goods at that point. There is, no doubt, a certain circularity in the phrase "delivery ex ship's rail shall constitute due delivery", but if for "due delivery" one reads "due performance of the obligation to deliver" the meaning is clear enough. This is a common enough provision in bills of lading and once the goods have passed over the ship's rail then, in the words of Starke J. in Keane v. Australian Steamships Pty.Ltd. (1929) 43 C.L.R. 484 at p.501, they will have been "delivered according to the exigency of the contract, and no further obligation" will rest upon the carrier. Again, in the words of Griffith C.J. in Australian United Steam Navigation Co.Ltd. v. Hiskens (1914) 18 C.L.R. 646 at p.657 :

> "The mode in which transfer of possession is to be effected is, in my opinion, entirely a matter for agreement between the consignor and the carrier, in each case, and when the carrier has done the stipulated acts in the agreed mode of making the transfer his contract to deliver has been performed".

Clause 7 is of interest only by way of analogy; it deals with the situation where the goods are discharged otherwise than at the port of discharge and in relation to that situation deals both with the carrier's responsibility (cf. cl.5), which "shall cease at the vessel's rail when the goods are so discharged", and with the question of due delivery (cf. cl.8). As to the latter it provides that discharge over the ship's rail "shall constitute due delivery of the goods under this Bill of Lading", the carrier acting as forwarding agent only after the goods have left the vessel's rail. "Discharge" is spoken of rather than "delivery", no doubt because where goods are unloaded otherwise than at the port of discharge it would be inapposite to speak of there being a "delivery". By way of

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contrast the word "delivery" is appropriate enough in cl.8 where the goods are in fact unloaded at the port of discharge. However whether it be "discharge", as in cl.7, or "delivery", as in cl.8, the effect is the same: in each case it is "due delivery of the goods" which is referred to in the sense of due performance of the carrier's contractual obligations.

So interpreted, the carrier's obligations under the bill of lading determine once and for all when, by discharge ex ship's rail, the carrier effects due delivery of the goods. Those provisions of cl.5 designed to exclude or diminish liabilities to which the carrier may otherwise become subject after discharge of the goods do not, I think, negate the ending of its obligations upon discharge. Read in context they are, I think, no more than an instance of the carrier then and there obtaining for itself the benefit of a contractual limiation of liability of which it may later have occasion to avail itself should it subsequently find itself in the position of a bailee of the goods under some bailment arising not ex contractu under the bill but from some dealing by it with the discharged goods. One other provision of the bill of lading calls for comment. In the attestation clause signed by the ship's agents occurs the usual reference to the carrier's agent having affirmed to three bills of like tenor, one of which being accomplished the others to stand void; then follows the statement that one of the bills "must be given up, fully endorsed, in exchange for release or delivery order". This provision does not, I think, lend any support to the view that the carrier's obligations persist after discharge, it is concerned with the function of the bill as a negotiable document of title rather than as a contract of carriage.

If the carrier's obligations under the bill determine upon due delivery over ship's rail the relevant employment of the stevedore referred to in cl.2 will be co-extensive and the immunities conferred by that clause will also determine at that point. They will therefore have no operation at the later time when the goods are lying in storage in the stevedore's custody awaiting collection by the consignee.

At first instance Sheppard J. rejected this view after careful consideration both of the clauses of the bill to which I have referred and

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(continued)

of the authorities. I have already indicated the different view which I take of the various clauses and it remains to refer to certain authorities which his Honour referred to. His Honour linked the words in the attestation clause with a reference to Sze Hai Tong Bank Ltd. v. Rambler Cycle Co.Ltd. [1959] A.C. 576 at p.586 where their Lordships discuss the liability of carriers who deliver goods without production of the bill of lading. The case was one in which their Lordships cut down the extreme width of an exemption clause which would otherwise have defeated what was described as one of the main objects of the contract, the proper delivery of the goods against production of the bill of lading. So far as appears from the report of the case (which is also, and rather more fully, reported in [1959] 2 Lloyd's Rep. 114) the bill of lading in question contained no such provision as cl.8 of the present bill and their Lordships treated the contractual obligation as being to deliver, on production of the bill of lading, to the person entitled. There was a breach of that obligation and the only question was whether the carrier would gain protection by an exemption clause. The case has, therefore, nothing to say of a case such as the present where the parties have agreed upon "delivery by discharge upon the wharf", as Rich J. put it in Keane's case at p.499, and such delivery has been effected; no question of exemption clauses arises. The distinction is between clauses of exemption such as their Lordships were concerned with and a clause such as the present cl.8 which is not concerned with exemption from liability for breach but with a definition of the act of due delivery.

The learned trial judge also referred to York Products Pty.Ltd. v. Gilchrist Watt & Sanderson Pty.Ltd. [1968] 3 N.S.W.R. 551 and to unreported New South Wales case of Keith Bray Pty. Ltd. v. Hamburg Amerikanische. He did so for the purpose of distinguishing them. In the first of these the question whether there had been due delivery under the bill of lading did not arise for decision; the main issue was whether or not the stevedore was a bailee of the goods. The bill of lading contained a provision that "when the goods are discharged from the vessel, they shall be at their own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the carrier shall be freed from any further responsibility". Of that provision Asprey J.A. said, at p.556, that it

> "expressly provided that the discharge of the goods from the vessel shall constitute complete delivery and performance under the bill of lading as well as providing that the ship should be freed from any further responsibility. The wording is so plain and unambiguous that ordinarily there could not be any doubt as to its legal effect".

His Honour then cited Hiskens' case. In fact the provision appeared in a clause similar in subject matter to cl.7 of the present bill of lading, and a submission seeking to limit its effect to the events set out in that clause explains his Honour's qualification, "ordinarily" etc. In the event, however, his Honour saw little merit in that submission, saying that he

> "would be of the view that upon the true construction of the bill of lading, personal delivery of the goods to the holder of the bill of lading was not required of the ship...".

His Honour in the upshot found it unnecessary finally to decide the matter one way or the other since the question for him was exclusively whether or not the stevedore was a bailee. His Honour's observations, agreed in by Walsh J.A., although obiter, do provide support for the interpretation which I have given to the present bill of lading. York Products went on appeal to the Privy Council - /1970/ 2 Lloyd's Rep. 1 - but their Lordships confined their observations to the liability of the stevedore.

His Honour's brief description of the facts in the Keith Bray case do not reveal the precise terms of the relevant bill of lading and I do no more than observe that the decision appears generally to accord with the view which I have taken of the present bill of lading. Sheppard J. felt able to distinguish these cases. He did so largely because of the view which he took of cl.5 and of the attestation clause in the present bill. The different view at which I have arrived is, of course, due to the different impression which these two clauses have had upon my mind.

I need only mention one further authority, the decision of Nevile J. in Automatic Tube Co. Pty.Ltd. v. Adelaide Steamship (Operations) Ltd. /1966/W.A.R. 103. I refer to it in part for the valuable analysis which it contains of Hiskens'

case and Keane's case and of their examination by Williams J. in Wilson v. Darling Island Stevedoring & Lighterage Co.Ltd. The decision is itself of interest. The sole issue was whether the goods had been "delivered" under the bill of lading; this it was necessary to determine for the purpose of a time limitation clause. The relevant clause in the bill of lading (which had not, in fact, been issued, this however being regarded as immaterial - see at pp.105-6) provided that the goods should be forwarded to the port of discharge

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(continued)

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> "and there the consignee to take delivery and all liability of the company and the ship to cease as soon as the goods are free from ship's tackles....".

After his review of the authorities, his Honour concluded, at p.114, that

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> "in this case delivery of the goods was made either when the goods were landed on the wharf and freed from the ship's tackles as would seem to have been indicated in Hiskens' case or at the very latest at the time they were placed in premises of McIlwraith's Transport Co. Ltd. and became available to the consignee, applying the qualification to Hiskens' case expressed by Knox C.J. and Gavan Duffy J. in Keane's case".

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The clause there under consideration was for all purposes identical with those considered in Hiskens' and Keane's cases, all clauses somewhat less specific as to delivery than is cl.8 of the present bill of lading. The specific provision which cl.8 makes concerning delivery allows of no room for the qualification imposed in Keane's case and points clearly to the conclusion that the carrier's obligations are wholly at an end once the goods pass over the ship's rail. "Due delivery" is effected by "delivery ex ship's rails" whether the consignee takes actual possession of the goods at that stage or, as is no doubt far more likely, does not take possession until after sorting and stacking and some days of storage on the wharf or in a warehouse.

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The interpretation of this bill of lading which I prefer is, of course, one which reduces to the bare minimum the carrier's obligations as to delivery. However, it may be doubted whether

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the result operates in any way to the detriment of consignees or consignors; the system of stevedoring and storage of goods once they are delivered ex ship's slings is a well developed one; the goods are taken into custody and are no doubt looked after as effectively by bailees having no contractual nexus with consignees (but who know that they will be remunerated by the consignee upon collection of the goods) as they would be were those bailments the result of contractual relationships whether as original bailees or as sub-bailees of the carrier - see generally per Lord Pearson in the York Products case on appeal (sub.nom. The Regenstain) [1970] 2 Lloyd's Rep. 1 at pp.11-4. Indeed a consignee may be advantaged, as it is in the present case, by the absence of any contractually imposed exemptions from liability, operating in favour of the bailee.

Accordingly, whether or not The Eurymedon should be followed, the consequence will be the same; the stevedore in the present instance will be unable to claim the advantage of the time limitation clause in the bill of lading. For these reasons I would dismiss this appeal.

This page and the preceding 20 pages represent my reasons for judgment in Port Jackson Stevedoring Pty.Ltd. v. Salmond & Spraggon (Aust.) Pty.Ltd.

Sd: Stephen

Reasons for Judgment of Mason and Jacobs JJ.

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REASONS FOR JUDGMENT
OF MASON AND JACOBS JJ.

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v.

SALMOND & SPRAGGON (AUSTRALIA) PTY.LIMITED

The respondent, Salmond & Spraggon (Australia) Pty. Limited, sued the appellant for damages for breach of duty as bailee which resulted in the loss of a consignment of razor blades lying in a shed upon a wharf, being No.2 Glebe Island, Sydney. The goods had been carried to Sydney from St.John, New Brunswick, in the New York Star. a vessel owned by the Blue Star

Line Limited. The vessel arrived in Sydney and commenced to discharge on 10th May 1970. The goods were discharge or about 12th May 1970 by the appellant, a stevedoring company, and were stacked and stored in a part of the wharf which was under its control - the "dead-house". Twenty-four hours later the goods were stolen. The goods had been shipped under a bill of lading. The shipper was the Schick Safety Razor Company of Canada; the consignee was the respondent. Thirty-seven cartons were shipped of which thirty-three, valued at $14,684.98, were stolen. The bill of lading contained conditions exempting servants and agents of the carrier (including independent contractors) from liability to the shipper, consignee or owner of the goods or to any holder of the bill of lading. We shall refer later to these conditions in some detail because the appellant relied on them by way of defence to the action. Sheppard J. who tried the action described the manner of the theft and the system which made it possible as follows:

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> " The second defendant did not submit that the goods were not, at all relevant times, in its possession. It was in occupation of the shed upon the wharf to which I have referred. Within that shed there was a separate section known as 'the dead house'. This was a section designed to provide greater security than was provided in other parts of the shed or on the wharf itself. In it were stored cartons of goods which had already been pilfered and also goods which were thought to be greater theft risks than others. Such goods included cartons of razor blades. In charge of the dead house at the relevant time was a supervising watchman named Bowdler. There were three other watchmen employed in the area, although not at all times in the dead house. On the wharf was a delivery office in which there was a delivery clerk. The delivery office was not in sight of anyone in the dead house. Also employed on the wharf were tally-on clerks.
>
> The duties of the tally-on clerks were to make tallies of the goods loaded on to the vehicles of carriers who came to collect goods on behalf of consignees. These duties could be performed either as the goods were loaded or after they had been loaded, and were performed by the making out of a tally slip which contained a description by

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reference to shipping marks on each carton or case of goods and tallied up the number of cases or cartons which had been loaded. The system in force then provided for the carrier to take the shipping documents and the tally slip to the delivery clerk who would, if satisfied that the documents were in order, issue a gate pass to enable the carrier to remove the goods which were the subject both of the shipping documents which he had brought with him to the wharf and the tally slip. There were two gates by which a carrier could leave the wharf and at each was a gatekeeper not employed by either defendant. It was his duty to look at the gate pass and make sure that the goods being removed were being removed with the authority of the stevedore, that is he was supposed to check the goods on the vehicle with what was written on the gate pass. Evidence of the system which I have described was given by Mr.Dermond who is the secretary of the second defendant. I accept his evidence.

On the day of the theft the thief approached Mr. Bowdler and said that he had come for the razor blades. Mr. Bowdler asked him whether he had his papers and he said that he had. He had papers in his hand. Mr. Bowdler's evidence proceeds as follows :-

> 'I said, "Would you go in the delivery office and check up with the head clerk, come back here and get the watchman to take the numbers of the ones you are going to take, the cartons you are going to take and also get a tally into the dead house.'
>
> Q. What did he do then? A. I watched him go out of the door of the wharf out to the delivery office and naturally I thought he had gone around to the delivery office and when he came back I said, "All right, get a Tally and take the numbers of the ones that are not pillaged which you are taking." Naturally he didn't have to show me anything. All I had to say, which I have always done up to date and I still do it is, "Have you been to the delivery office?". I said to him, "There are three Tallies sitting over there in the sun. Get one of them to come over here and check the numbers."

Q. Did he go over? A. He went over to the Tally and I seen him go to the Tally clerk. I seen the Tally clerk nod his head. He could have said, "What's it like sitting in the sun?" or something like that.

Q. Having seen the Tally clerk nod his head this man came back to you then? A. Then he came back and started to wheel the big cartons out.

Q. What did he do when they wheeled them out? A. They were loading on to a truck, two of them, two men.

Q. Did you observe all the thirty-three cartons being wheeled out of the dead house? A. Yes. I interrupted again and I said, "What's your Tally doing? He should be checking numbers. He should be over here taking the numbers." I have often had an argument when Tallies would not come to the dead house. I cannot get them by the hand and drag them into the dead house."

Mr.Bowdler said that when the thief left to go, as he thought, to the delivery clerk, he came out of the wharf shed and disappeared from his view. He then came into view again and it was then that Mr. Bowdler saw him speak to one or other of the tally-on clerks. After he had spoken to the clerk he returned to the dead house and with the other man commenced to load the thirty-three cartons on to the truck. Mr. Bowdler was present whilst that took place in the dead house. Apparently he did not speak to the thief or his assistant further. He did not see the truck drive away. Some time later he looked over towards the door and the truck had gone.

In fact the thief did not have a tally slip made out, and had not gone to the delivery office. He left the wharf and drove through one of the exit gates at high speed giving the gatekeeper no opportunity to shut the gate in front of him."

Sheppard J. concluded that the theft was caused by negligence in the system followed by the appellant and by the casual negligence of its employees in the operation of that system. The system whereby some

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employees handled the goods whilst another employee examined the shipping documents, with a division of responsibility which made it possible for the thief to load the goods from the dead-house without production of the shipping documents was held to constitute a failure to take reasonable care on the part of a custodian of goods exposed to a special risk of pilfering. The finding of negligence on the part of the appellant's employees was based on the failure of the tally clerk to check the goods on to the truck. This omission enabled the thief to bypass the delivery office where the documents were required to be produced. There has been no challenge before us to these findings of the primary judge. 10

By accepting the bill of lading and asking for delivery of the goods, the consignee is entitled to the benefit of, and bound by, its stipulations as against the carrier (Brandt v. Liverpool, Brazil and River Plate Steam Navigation Company Ltd., [1924] 1 K.B. 575). Moreover, in certain circumstances it has been held that the stevedore, notwithstanding that he is not a party to the contract, will be entitled as against the consignee to the protection given to the carrier, its servants and agents (including independent contractors) by the bill of lading (New Zealand Shipping Co.Ltd. v. A.M. Satterthwaite & Co.Ltd. (The Eurymedon), [1975] A.C.154). Earlier, Lord Reid had said in Scruttons Ltd. v. Midland Silicones Ltd., [1962] A.C. 446, at p.474 : 20 30

> "I can see a possibility of success of the agency argument if (first) the bill of lading makes clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore (thirdly) the carrier has authority from the stevedore to do that, or perhaos later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome. And then to affect the consignee it would be necessary to show that the provisions of the Bills of Lading Act, 1855, apply." 40 50

In The Eurymedon Lord Reid's observation was accepted as a correct statement of the law subject

to the qualification that the consignee is affected by an implied contract arising from the fact of his taking delivery of the goods even when the Bills of Lading Act, 1855 and its more modern counterparts have no application.

It is not now disputed that the first and second conditions mentioned by Lord Reid were satisfied in this case. The bill of lading makes it clear that the stevedore is intended when acting in the course of or in connection with his employment to be protected by the provisions limiting liability and that the carrier is contracting as agent for the stevedore is ensuring that these provisions apply to it. In this respect cl.2, a clause known as the Himalayan clause, provided :

> "no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment, and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defense and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading."

The primary judge found that the third condition was satisfied, namely that the stevedore had ratified the act of the carrier in contracting

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on its behalf. The New South Wales Court of Appeal, without expressing any opinion upon this question, held that the carrier in contracting for the stevedore's protection did do with the appellant's authority. Its reasons for so concluding was expressed by Glass J.A. in these terms :

> "The stevedore had for years enjoyed a monopoly of the carrier's business in the port of Sydney. Bills of Lading containing the Himalayan clause had been in use for some time before 1970. The stevedore proved that it was familiar with the terms of the bill of lading in general and with the clauses purporting to exempt independent contractors in particular. There was also evidence that prior to the loss of the goods in question, claims had been made on the stevedore and rejected in reliance upon the exemption clauses. There is from this material, in my opinion, a clear implication that when the carrier included the Himalayan clause in its bills of lading it did so as agent with the authority of its principal the stevedore."

On this point we need do no more than state our agreement with what Glass J.A. has said.

The issue as to the fourth condition is not disposed of quite so easily. Glass J.A. stated that at the trial satisfaction of the condition was conceded by the respondent and this seems to be supported by the circumstance that the issue is not dealt with by the primary judge in his reasons for judgment. However, the Court of Appeal allowed the issue to be raised by the respondent on the footing that the appellant conceded that its case at the trial would not have been differently presented had the point been taken. Although the appellant endeavoured before us to establish that no such concession had been made, the Court of Appeal was in our opinion justified in concluding that the concession had been made.

It is necessary then to examine the question of consideration. The theory underlying the contract which arises between the shipper and the stevedore is that the carrier contracts on behalf of the stevedore, there being a promise on the part of the shipper to exclude the stevedore's liability in the circumstances envisaged by cl.2. This promise becomes binding on the stevedore's discharging the goods,

notwithstanding that he is bound to do that act by virtue of his independent contract with the carrier. So it was held in The Eurymedon.

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Despite this decision the Court of Appeal considered itself free to hold that the shipper's offer to exempt the appellant did not give rise to a binding contract in the present case, because the discharge of the goods did not constitute valuable consideration, there being
10 aliunde a binding promise by the appellant to do that work under its contract with the carrier. In arriving at this conclusion the Court of Appeal took the view that the evidence established no more than that the appellant discharged the goods from the ship, with knowledge of the shipper's offer to exempt it from liability. The Court pointed out that when conduct is relied on as an acceptance of, and as the consideration for, an offer, the acceptor must be shown to have
20 acted in reliance on the offer (The Crown v. Clarke (1927), 40 C.L.R. 227). There is nothing in the process of reasoning to this point with which we would disagree. But their Honours appear to have overlooked the circumstance that proof of performance of the conditions to an offer by a person who knows of its existence will in general constitute prima facie evidence of acceptance of the offer. The position in our view is correctly stated by Starke J. in The Crown v. Clarke (at
30 p.244), where his Honour was discussing an offer of a reward for the giving of information, as follows :

"In my opinion the true principle applicable to this type of case is that unless a person performs the conditions of the offer, acting upon its faith or in reliance upon it, he does not accept the offer and the offeror is not bound to him. As a matter of proof any person knowing of the offer
40 who performs its conditions establishes prima facie an acceptance of that offer . . . It is an inference of fact and may be excluded by evidence."

The observations made by the Court in Australian Woollen Mills Pty.Ltd. v. The Commonwealth (1954) 92 C.L.R. 424, at pp.456-457, do not displace what Starke J. said. There it was held that an announcement made by the Commonwealth that a subsidy would be paid to manufacturers on wool purchased and
50 used for local manufacture after a certain date did not constitute a request or invitation to purchase wool. Accordingly it was not an offer capable of ripening by acceptance into a contract.

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Dixon C.J. Williams, Webb, Fullagar and Kitto JJ. discussed the making of contracts arising from the acceptance of an offer of a promise for an act and said (at pp.456-457) :

> " In cases of this class it is necessary, in order that a contract may be established, that it should be made to appear that the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement. Between the statement or announcement, which is put forward as an offer capable of acceptance by the doing of an act, and the act which is put forward as the executed consideration for the alleged promise, there must subsist, so to speak, the relation of a quid pro quo."

Their Honours went on to give an example - "A, in Sydney, says to B in Melbourne: 'I will pay you £1,000 on your arrival in Sydney'. The next day B goes to Sydney" - and pointed out that if these facts alone were proved, no contract is established because there may be no relation between A's statement and B's act. The possibility, not excluded, is that B intended to go to Sydney in any event and that A is merely stating that he will make a gift to B if and when B arrives in Sydney. However, their Honours observed that it would be otherwise if it were proved that A requested B to go to Sydney, saying (at p.457): "The necessary connection or relation between the announcement and the act is provided if the inference is drawn that A has requested B to go to Sydney."

In the Australian Woollen Mills case the Court was directing its attention primarily to the character of the statement relied on as an offer. The Court did not suggest that oral evidence of reliance on an offer was necessarily or generally required. The point made was that there is no fertile ground for inference of reliance on an offer unless a request, and consequentially an offer, is established by the evidence.

In our view the Court of Appeal in the present case could and should have drawn the inference that the appellant discharged the goods in reliance on the shipper's promise or

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offer of which it was aware. The contract here is indistinguishable from the contract upheld by the Judicial Committee in The Eurymedon. Of that contract Lord Wilberforce had this to say (at p.167) :

> " If the choice, and the antithesis, is between a gratuitous promise, and a promise for consideration, as it must be in the absence of a tertium quid, there can be little doubt which, in commercial reality, this is. The whole contract is of a commercial character, involving service on one side, rates of payment on the other, and qualifying stipulations as to both. The relations of all parties to each other are commercial relations entered into for business reasons of ultimate profit. To describe one set of promises, in this context, as gratuitous, or nudum pactum, seems paradoxical and is prima facie implausible."

In such a context an inference that the stevedore has acted in reliance on the shipper's promise or offer is so much more compelling than the inferences which were sought to be drawn in the situations which arose in The Crown v Clarke (where the information for which a reward was offered was given in equivocal circumstances) and in the Australian Woollen Mills case.

Common sense and knowledge of human affairs indicate the evident probability of the appellant acting in reliance on the shipper's promise or offer when he discharges the goods so long as he has knowledge of the existence of that promise or offer. Once accepted by performance of the services, it conferred protection upon the appellant, in terms of cl.2 of the bill of lading, without subjecting the appellant to any countervailing or consequential detriment. There was therefore strong reason for thinking, and no reason for denying, that the stevedore acted in reliance on the offer in performing those services which fell within cl.2 of the bill of lading.

Accordingly, we are unable to share the Court of Appeal's view on this aspect of the case. It is a view which in any event is in conflict with the actual decision of the Judicial Committee in The Eurymedon. There the element of consideration was held to be satisfied in circumstances where all that appeared was that the stevedore performed his services with knowledge

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of the existence of the shipper's offer. None the less it was held that consideration moved from the stevedore. Plainly their Lordships did not regard it as a case in which the stevedore was obliged to adduce actual evidence of its intention to rely on the offer. The Eurymedon is therefore an authority on this point. The adequacy of the consideration was the only matter in dispute in The Eurymedon when it was before the Privy Council and its conclusion in this respect on indistinguishable facts becomes a precedent binding on the New South Wales Court of Appeal. It was not open to that Court by a different approach through a different line of authorities to find a lack of consideration.

There is however a difference between the facts in The Eurymedon and those in the present case. Whereas in The Eurymedon the goods were damaged while they were being unloaded, in the present case the goods had been unloaded and the contract of carriage was at an end. The goods had been stacked and stored on the wharf for twenty-four hours. It is therefore important to define the precise subject matter with which their Lordships were dealing in The Eurymedon. They were dealing with a case where the stevedore claimed the same immunity or limitation which the carrier at the same time and in the same circumstances could have claimed if it had been sued by the shipper. Since the stevedore was unloading the goods from the ship, it was performing on behalf of the carrier work which the carrier was bound to perform either personally or by its servant or agent (including an independent contractor). In whatever of these ways the carrier performed the contract it remained liable under the contract according to its terms, including the terms limiting liability. In that context the majority of their Lordships in The Eurymedon enunciated the course of reasoning whereby in those circumstances a contract could be found between shipper and stevedore giving to the stevedore the immunities of the carrier. Clause 1 of the bill of lading in The Eurymedon, which was in the same terms as cl.2 of the present bill of lading, extended the immunities to a servant or agent of the carrier (including an independent contractor) "in respect of any act neglect or default on his part while acting in the course of or in connection with his employment". If the clause had gone further than this, the course of reasoning, depending as it did so much on the commercial reality of the situation, would not

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necessarily have been the same.

The questions whether persons other than the contracting carrier, particularly stevedores, can in any, and if so what, circumstances rely on an immunity or limitation in terms of a clause in a bill of lading have in recent years caused considerable difference of judicial opinion. The underlying reason for this is that two broad principles tend to oppose one another. On the one hand the subject matter is an immunity or limitation of liability clause and in recent decades these have been viewed with disfavour - or, to put it another way, construed narrowly and applied strictly. On the other hand, in the case of the sea carriage of goods, it is notorious in the commercial world that bills of lading ordinarily contain exclusion and limitation clauses within the limits allowed by statutes of many trading nations and which are embodied in the Rules in the Schedule to the Sea-Carriage of Goods Act 1924 (Cth.) It is also notorious that these clauses usually purport to give immunity not only to the carrier but also to his servants and agents and to his independent contractors acting in the course of their employment by the carrier. The whole transaction of shipping goods by sea takes place in an established commercial context of which the exclusion clauses form part. If some so-called strict and logical application of legal principle denies validity thereto, then the law is not promoting but is defeating the expectations of commercial men.

Both these approaches can be observed in the judgments in the decided cases. We mention them because they provide some explanation of the variant courses which the law has tended to take. Those who fear the spill over of extended immunity from commercial fields such as the sea carriage of goods to other fields of contract will tend to formulate a principle of the law of contract which will deny the immunity. Those who would emphasise the need for the law to be consonant with commercial reality will strive by choice of an appropriate rule of contract or of trusts to give effect to the intended immunity.

The different approaches can be observed in the differences between the majority and the minority of their Lordships sitting as the Judicial Committee in The Eurymedon. The minority regarded the case as covered by the rule that a third party cannot take the benefit at law of a contract between two other persons - the rule in Tweddle v. Atkinson (1861), 1 B. & S. 393. The majority of

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course accepted this principle but on the different terms of the bills of lading in the respective cases were prepared to distinguish Wilson v. Darling Island Stevedoring and Lighterage Co.Ltd. (1956), 95 C.L.R. 43 and the decision of the House of Lords in Scruttons Ltd. v. Midland Silicones Ltd., [1962] A.C. 446. The latter were, it was said, each "a simple case of a contract the benefit of which was sought to be taken by a third person not a party to it". They found in The Eurymedon something more, namely, an actual contract between the shipper and the stevedore through the carrier as agent for the stevedore. They set out what Lord Reid had said in Scruttons Ltd. v. Midland Silicones Ltd. and which we have already quoted. 10

When the circumstances described by Lord Reid exist, the stevedore will on the generally accepted principles of the law of contract be entitled to his personal contractual immunity. The importance of The Eurymedon is the manner in which on the bare facts of the case their Lordships were able to discern a contract between the shipper and the stevedore, and, we would add, to do so in a manner which limited the approach to those commercial contexts in which immunity of the stevedore was clearly intended in form and almost certainly known by both the shipper and the stevedore to be intended. Thus the chance of the reasoning being allowed to spill over into an application to cases where an ordinary member of the public would not have read the "fine print" of some contract into which he had entered was minimised. Commercial expectation could thus be reconciled with a strict reading of immunity and limitation clauses in general. 20 30

The particular approach adopted by the majority in The Eurymedon and the difference between the facts in that case and in the present case make it necessary closely to examine the provisions of the bill of lading applicable to the goods when the actual carriage was at an end. 40

The bill of lading commenced as follows :

" RECEIVED from the Shipper hereinafter named, the goods or packages said to contain goods hereinafter mentioned, in apparent good order and condition, unless otherwise indicated in this bill of lading to be transported subject to all the terms of this bill of lading with liberty to proceed via any port or ports within the 50

scope of the voyage described herein, to the port of discharge or so near thereunto as the ship can always safely get and leave, always afloat at all stages and conditions of water and weather, and there to be delivered or transhipped on payment of the charges thereon . . . .

It is agreed that the custody and carriage of the goods are subject to the following terms on the face and back hereof which shall govern the relations, whatsoever they may be, between the shipper, consignee, and the Carrier, Master and ship in every contingency . . . . "

The bill of lading was signed for the master and the owners (who in fact were charterers) with an attestation clause in the following terms :

"Witness whereof the Master, Purser or duly authorised Agent of the Carrier hath affirmed to Three Bills of Lading, all of this tenor date, one of which being accomplished, the others to stand void. As required by the Carrier or his Agents, one of the Bills of Lading be given up, fully endorsed, in exchange for release or delivery order."

Then followed the numbered conditions. Clause 1 provides :

" 1. This Bill of Lading shall have effect subject to the provisions of the Water Carriage of Goods Act, 1936, enacted by the Parliament of the Dominion of Canada, and the said Act shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities under the said Act. If any term of this Bill of Lading be repugnant to the said Act to any extent, such terms be void to that extent, but no further. Nothing herein contained shall prevent the carrier from claiming in the courts of any country the benefit of, or derogate in any way from any statutory protection or limitation of liability afforded to shipowner or carrier by laws of such country or by the laws of the country in which the goods were shipped or discharged."

Clause 2 is the Himalaya clause which we have already set out. The other relevant clauses are :

" 5. The Carrier's responsibility in respect of the goods as a carrier shall not attach until the goods are actually loaded for transportation upon the ship and shall terminate without notice as soon as the goods leave the ship's tackle at the Port of Discharge from Ship or other places where the Carrier is authorized to make delivery or end its responsibility. Any responsibility of the Carrier in respect of the goods attaching prior to such loading, or continuing after leaving the ship's tackles as aforesaid, shall not exceed that of an ordinary bailee, and, in particular, the Carrier shall not be liable for loss or damage to the goods due to - flood; fire, as provided elsewhere in this bill of lading, falling or collapse of wharf, pier or warehouse; robbery, theft or pilferage; strikes, lock-outs or stoppage or restraint of labor from whatever cause, whether partial or general; any of the risks or causes mentioned in paragraphs (a), (e) to (k), inclusive, and (k) to (p), inclusive, of subdivision 2 of section 4 of the Carriage of Goods by Sea Act of the United States, or any risks or causes whatsoever, not included in the foregoing, and whether like or unlike those hereinabove mentioned, where the loss or damage is not due to the fault or neglect of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any non-delivery or mis-delivery or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier."

" 8. Delivery of the goods shall be taken by the consignee or holder of the Bill of Lading from the vessel's rail immediately the vessel is ready to discharge, berthed or not berthed, and continuously as fast as vessel can deliver notwithstanding any custom of the port to the contrary. The Carrier shall be at liberty to discharge continuously day and night, Sundays and holidays included, all extra expenses to be for account of the Consignee or Receiver of the goods notwithstanding any custom of the port to the contrary. If the Consignee or holder of

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the Bill of Lading does not for any reason take delivery as provided herein, they shall be jointly and severally liable to pay the vessel on demand demurrage at the rate of one shilling and sixpence sterling per gross register ton per day or portion of a day during the delay so caused; such demurrage shall be paid in cash day by day to the Carrier, the Master or Agents. If the Consignee or holder of the Bill of Lading requires delivery before or after usual hours he shall pay any extra expense incurred in consequence. Delivery ex ship's rail shall constitute due delivery of the goods described herein and the carrier's liability shall cease at that point notwithstanding consignee receiving delivery at some point removed from the ship's side and custom of the port being to the contrary. The Carrier and his Agents shall have the right of nominating the Berth or Berths for loading and discharging at all ports and places whatsoever, any custom to the contrary notwithstanding. The Carrier shall not be required to give any notification of disposition or arrival of the goods."

" 17. In any event the Carrier and the ship shall be discharge from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear."

There are apparent difficulties in reading all the clauses of the bill of lading together, but we think that they can be reconciled, when account is taken of the Hague rules incorporated in the statutory provisions which are the same in the Water Carriage of Goods Act, 1936 (Canada) as in the Sea Carriage of Goods Act 1924 (Cth.). Article VII of the Rules in the Schedule to the Acts provides :

"Limitations on the Application of the Rules

Nothing herein contained shall prevent a carrier or a shipper from entering into an agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the

ship for the loss or damage to or in connexion with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods were carried by sea."

And the words "carriage of goods" are stated in Art. 1(e) to cover the period from the time when the goods are loaded on to the time when they are discharged from the ship. 10

By cl.5 of the bill of lading the carrier's responsibility in respect of the goods as a carrier terminates as soon as the goods leave the ship's tackle. By cl.8 the consignee is required to take delivery from the vessel's rail immediately the vessel is ready to discharge. Delivery ex ship's rail is by the same clause to constitute due delivery of the goods and it is provided that the carrier's liability shall cease at that point notwith- 20 standing the consignee receiving delivery at some point removed from the ship's side. Nevertheless, it is envisaged that the carrier may unload the goods without the consignee taking delivery ex the ship's rail and it is then made clear that the obligations of the carrier as a carrier are at an end, and at most its obligations are those of a bailee with the exceptions to liability expressed in cl.5. And that liability is further limited by the limitation 30 of time for action provided for in cl.17.

The carrier, having completed the carriage of the goods, employed the appellant stevedore to deliver the goods on its behalf for the holder of the bill of lading. The first question which arises is whether the carrier employed the appellant to do anything after the termination of the sea carriage except to deliver the goods against a copy of the bill of lading. Can it be said that the appellant was 40 performing in the course of or in connection with an employment by the carrier a duty arising under the bill of lading to keep the goods safe pending delivery to the holder of the bill of lading? The answer is - No. Any duty of the carrier to take care of the goods, after the completion of the sea carriage and if delivery was not taken ex ship's rail, would arise, not from an obligation under the bill of lading, but from the fact of any actual possession of 50 the goods which it might have as a bailee. The bill of lading in cl.5 does not impose this

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obligation. It defines the contractual obligation as ending when the goods are unloaded and thereby limits any further obligation to that which would arise under the general law of bailment as distinct from the law governing sea-carriage of goods. We do not mean thereby that the operation of the bill of lading is exhausted. Clearly it is not. The exemption and limitation provisions continue to operate according to their terms. There remains the obligation under the contract to deliver the goods in exchange for a copy of the bill of lading.

However, it does not follow that the appellant was acting as the agent of the carrier when it stacked and stored the goods on the wharf. The appellant stacked and stored the goods on the wharf on behalf of and at a charge to the holder of the bill of lading. The obligation to stack and store pending delivery was not imposed by the bill of lading upon the carrier or upon anyone else. Neither the carrier nor his port agent, the first named defendant, was in possession of the goods as bailee when the goods had been unloaded on to the wharf even though the goods remained at their order until a copy of the bill of lading was exchanged for them. Cf. York Products Pty. Ltd. v. Gilchrist Watt & Sanderson Pty.Ltd. (1968) 3 N.S.W.R. 551; (1970) 2 Ll.L.R. 1. Sheppard J. at first instance concluded that the ship's agent did not have possession of the goods after they had been unloaded on to the wharf, and we agree with this conclusion. It follows that any liability of the appellant arising from its possession of the goods is a liability which arose independently of any liability in the carrier. If there were any doubt that this was so, the position is made quite clear by the concluding words of condition 5. These words have the effect that when the carrier has through the appellant as stevedore unloaded the goods into the hands of the appellant, it, having ceased to have actual custody of the goods, was not liable for loss of the goods in any capacity, either that of carrier or of bailee.

Whereas in The Eurymedon the stevedore was held entitled to the immunity in circumstances where the carrier was entitled to the same immunity arising under the same provision in the bill of lading, in the present case the appellant claims, independently of the carrier, the limitation of time for action contained in

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(continued)

cl.17. However, the carrier's immunity arises from it not having had actual custody. It therefore had no need to rely on condition 17.

The question then arises whether condition 17 gives the appellant the benefit of the limitation contained therein in cases where the carrier is otherwise not liable or only in cases where there is a concurrent liability in the carrier. In our opinion, the reasoning underlying the implication in The Eurymedon of a contract between shipper and stevedore is that there can be found to exist an agreement between shipper and stevedore that where in particular circumstances the carrier has the benefit of a clause giving immunity or limitation, then in those circumstances the stevedore shall be entitled to rely on that same immunity or limitation to which the circumstances have given rise. The reasoning underlying the finding of a contract between shipper and stevedore is that the immunity or limitation is transferred, that what has been called a vicarious immunity or limitation of action arises in favour of the stevedore. It would be a great extension of The Eurymedon doctrine to apply it to a case where the immunity or limitation of action is not one which the carrier, its servants and agents (including independent contractors) all could claim, but is one where no liability would arise in the circumstances in the carrier. It is not an extension which in our opinion ought to be made. There was something commercially unreal in the way legal principle could be applied to give a sea-carrier an immunity but at the same time to deny it to his servant or his agent even though an immunity in their favour was intended. The benefit of the immunity could for instance be lost to the carrier if under the general law or as a result of a particular contract he was bound to indemnify his servant or agent. However, if the negligence of the independent contractor is not negligence for which the carrier would, in the absence of the immunity or limitation clauses, be vicariously liable but is the sole responsibility of the independent contractor, the expressed reasons of the majority in The Eurymedon cease to be applicable. The case remains one where it is proper to apply the course of decision relied on by the minority. The rule in Tweddle v. Atkinson can properly be applied, especially when recourse may properly be had to the rule that immunity and limitation clauses in contracts will be strictly construed. The various considerations referred to by Sheppard J. at the conclusion of his judgment

strongly support a conclusion that The Eurymedon should not be applied to a case where the carrier has completed the due performance of its obligations of carriage and unloading and a stevedore or wharfinger has undertaken independently of the carrier the storage of the goods on the local wharf.

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(continued)

If the case were one of misdelivery and not of negligence in the safekeeping of the goods on the wharf, the appellant might be able to claim the benefit of cl.17. The stevedore was the agent of the carrier to deliver the goods to the consignee in exchange for a copy of the bill of lading. A delivery of the goods to a stranger without requiring the production and exchange of a copy of the bill of lading would be an act which, even though unauthorised by the carrier, might create a vicarious liability in the carrier. Further, it might be outside the immunity provisions of the bill of lading on the true construction of the latter. See Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd. [1959] A.C.576. We say "might" create a vicarious liability because we do not find it necessary to determine whether in the concluding words of cl.5 the words "occurring while the goods are not in the actual custody of the Carrier" govern the words "non-delivery or mis-delivery" as well as the words "loss of or damage to the goods". The facts of the present case do not support a case of misdelivery of the kind considered in the last mentioned case or in The Council of the City of Sydney v. West (1965) 114 C.L.R. 481. In the latter case, it will be recalled, the Council was held not to be exonerated from liability for the loss of the respondent's vehicle by an exemption clause which excluded liability for loss of a vehicle (however such loss may arise or be caused). The clause was one of the conditions on a parking ticket issued to the respondent when he parked his car in the Council's parking station. The ticket also bore the notation "IMPORTANT. This ticket must be presented for time stamping and payment before taking delivery of the vehicle". The attendant permitted a stranger who presented a duplicate ticket relating to another vehicle to drive the vehicle out of the station. It was held that the exemption clause did not exempt the appellant Council from liability for the misdelivery. Barwick C.J. and Taylor J. said (at pp.488-489) :

"To our minds the clause clearly appears as one which contemplates that, in the

performance of the Council's obligations under the contract of bailment, some loss or damage may be caused by reason of its servants' negligence but it does not contemplate or provide an excuse for negligence on the part of the Council's servants in doing something which it is neither authorized nor permitted to do by the terms of the contract."

Their Honours, after referring to evidence which established that the function of the attendant who was posted at the exit was to permit vehicles to proceed only upon the surrender by the driver of an appropriate parking ticket, the ticket being the customer's "entrance card into and out of the parking station", concluded by saying (at p.489): 10

> "To our minds, therefore, the act of the attendant in permitting 'Robinson' to proceed after handing over the duplicate ticket which he had obtained constituted an unauthorized delivery of possession by him to 'Robinson' and not a mere act of negligence in relation to some act authorized by the contract of bailment." 20

Windeyer J. decided the case adversely to the Council on the related ground that the Council had undertaken to deliver the vehicle only upon presentation of the appropriate parking ticket and it had released the vehicle from its custody without such presentation. 30

In the present case the goods were allowed to be loaded on to the thieves' truck but the loading was not an unconditional but mistaken delivery of the goods. The loading was on condition that a delivery order and copy of the bill of lading be exchanged for a gate pass in respect of the goods. The thieves, once the goods had been loaded, drove off and forced their way through the gate. The negligence lay in a system which allowed a conditional loading of the goods, not in delivering the goods without requiring a copy of the bill of lading. It was a failure to keep the goods safely on the wharf and it makes no difference that the loss of the goods occurred, not by pilfering or robbery, but by tricking the servants of the respondent into allowing the goods to be loaded on to a vehicle and then forcing a way out of the wharf. It follows therefore that the appellant stevedore did not as agent for the carrier misdeliver the 40 50

goods; rather, it as bailee failed to take reasonable care of the goods. This separate act of negligence was not the subject of cl.2 of the bill of lading and therefore the appellant was not entitled to rely on the limitation of action provision in cl.17.

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(continued)

The particular grounds of appeal relating to the form of the order for costs made in the
10 Court of Appeal were not argued and it is not necessary to consider them. For these reasons we would dismiss the appeal with costs.

No argument was presented upon the cross-appeal in respect of that order for costs and this appeal should also be dismissed with costs.

This and the preceding twenty-four pages represent our joint reasons for judgment
20 in Port Jackson Stevedoring Pty.Limited v. Salmond & Spraggon (Australia) Pty.Limited.

Sd: J.S.Mason

Sd: K.R.Jacobs

REASONS FOR JUDGMENT
OF MURPHY, J.

Reasons for Judgment of Murphy J.

3rd April 1978

PORT JACKSON STEVEDORING PTY.LTD.

v.

SALMOND AND SPRAGGON (AUSTRALIA) PTY.LTD.

One of the grounds of appeal is that, as
30 the Court of Appeal reversed Mr. Justice Sheppard's decision "upon an argument not urged or agitated before him and not the subject of factual enquiry at the trial", the respondent should not have been granted leave to present the argument and it should not be allowed to rely upon it. The resolution of this point, and, therefore, of this decision, involves the application of the Judiciary Act 1903 as amended and of the High Court Rules
40 (an instrument made under that Act). The Court of Appeal stated in its reasons for

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3rd April 1978
(continued)

judgment that the appellant had conceded that it would not have sought to tender any other evidence if the issue had been raised before the primary judge. The correctness of this statement was denied by the appellant, but asserted by the respondent. The appellant sought to rely on an affidavit it had filed in this Court detailing part of the course of proceedings before the Court of Appeal, but was not permitted to add to the record filed in accordance with the High Court Rules. The proper application of this Court's appeal powers under the Judiciary Act allows the respondent to rely upon the argument.

The first question is whether Port Jackson Stevedoring Pty.Ltd. (the stevedore) is entitled to rely on the terms of the contract between Blue Star Line Ltd. (the carrier) and the consignor, to which the respondent consignee, Salmond and Spraggon, became a party. In New Zealand Shipping Co.Ltd. v. A.M.Satterthwaite & Co.Ltd. (The Eurymedon) [1975] A.C.154, the Privy Council held that the stevedore can rely on the terms of a contract, although not a party to it, if certain conditions are satisfied. One of these conditions is that there is consideration by the stevedore, but in this case, the Court of Appeal thought there was no consideration as the stevedore was not shown to have relied upon the promised immunity in the bill of lading when it performed its work of discharging the ship. However, the evidence that the stevedore knew of the terms of the bill of lading and acted in accordance with them raises a presumption that it relied upon them.

The insistence upon an element of consideration in the attempt to preserve a general theory of contract applicable in every situation forces the law into undesirable technicalities. The general theory of contract has some shaky foundations and the doctrine that consideration is necessary was a late development. In the carriage of goods by sea, there are special practical considerations which suggest that the requirement of consideration by the stevedore may be undesirable. There are strong reasons for contract law to evolve so that obligations which a consignee undertakes (and the immunities expressed to be conferred by him on the stevedore by a bill of lading) should apply for a stevedore's benefit irrespective of whether there was any consideration. As The Eurymedon shows, there is no great difficulty in finding

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(continued)

a theory to justify extending to a stevedore the immunities and other advantages which are expressed to be extended to it by a bill of lading. If the adoption of such a theory as part of our decisional law would serve Australia's interests, this should be done. However, the overseas carriage of goods and the stevedoring industry are enmeshed by restrictive practices. Australian importers have no real freedom in their arrangements; to regard these as being in the area of contract is a distortion. The bill of lading in this case shows that, although there are references to the carrier's obligations, the thrust of the document is to relieve the carrier and its agents from virtually all responsibility. I agree with Mr. Justice Stephen's observations on the aspects of public interest.

My conclusion is that a contract should not be conjured up out of the circumstances in order to extend the exemptions and immunities under the bill of lading to the stevedore. For this reason, I would dismiss the appeal.

I will deal with the other main contention. Mr. Justice Sheppard rejected the respondent's argument that (assuming the stevedore was entitled to the immunities of the bill of lading) the carrier's obligations and the stevedore's immunity ended when the goods were passed over the ship's sides or discharged from the ship's tackles, that is, before the events giving rise to the claim. The respondent repeated the argument to the Court of Appeal, which rejected it as being without substance and adopted Mr. Justice Sheppard's reasons. In this Court, the respondent's counsel stated that he was reluctant to put the argument again "because it does appear, at least on a fair reading of parts of the bill of lading, that it extends beyond the time the goods pass over the ship's side or are discharged from the ship's tackle".

Clause 5 of the bill of lading provides that "the carrier's responsibility in respect of the goods as a carrier... shall terminate without notice as soon as the goods leave the ship's tackle at the port of discharge". Clause 8 provides that "delivery of the goods shall be taken by the consignee or holder of the bill of lading from the ship's rail immediately the vessel is ready to discharge", that "delivery ex ship's rail shall constitute

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3rd April 1978

(continued)

due delivery of the goods" and that "the carrier's liability shall cease at that point notwithstanding consignee receiving delivery at some point removed from the ship's side". These suggest that the bill of lading required the carrier to do no more than discharge the goods at the port of discharge. It was stated in Sze Hai Tong Bank Ltd. v. Rambler Cycle Co.Ltd. /1959/ A.C.576 at 586 that "the contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading", but in this bill, the attestation clause provides "as required by the carrier or his agents, one of the bills of lading will be given up, fully endorsed, in exchange for release or delivery order". This suggests that the carrier may, but need not, require exchange of bill for delivery. Once the cargo is discharged, the carrier and its agents have no further obligation (see Keane v. Australian Steamships Pty.Ltd. (1929) 43 C.L.R. 484). But cl.8 of the bill contemplates that delivery may occur "at some point removed from the ship's side" and also provides that any responsibility of the carrier in respect of the goods continuing after leaving the ship's tackle shall not exceed that of an ordinary bailee.

A view fairly open is that if the carrier does assume the role of bailee by storing or caring for the cargo, the exemptions and immunities apply to it whilst so acting, and also to any agent, including the stevedore. If the bill were looked at in isolation, I would be inclined to read the immunities and exemptions as extending beyond the discharge of the cargo. On that construction, as the suit was not commenced until after one year from the loss, cl.17 would give the stevedore immunity. The respondent claimed that immunity in cl.17 is restricted to the liabilities mentioned in exemption clauses. This cannot be right. Where the exemption clauses apply, there is no room for the operation of immunity from suit as no liability arises. The words, "in any event" are intended to cover such liability as exists despite the exemption clauses. It is thus unnecessary to decide whether the exemption clauses, if available, applied. I think they did.

However, the document is not to be read in isolation. As I indicated earlier, this one-sided document arises in circumstances where consignees have no real choice and the bill reflects this. The question whether the carrier's obligations extended beyond the

In the High Court of Australia

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3rd April 1978

(continued)

discharge of the cargo conceals the real question which is whether the zone of irresponsibility extends beyond the discharge. The document is confused enough to treat it as ambiguous. I would read it strongly against the carrier and its agent and hold that the exemptions and immunities ceased upon discharge of the cargo. Thereafter the stevedore assumed the role of bailee and
10 should be liable as such without the exemptions and immunities in the bill of lading.

The respondent did not advance any argument based on the Sea-Carriage of Goods Act 1924, s.9(2) which provides :

> "Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of any bill of lading or document
> 20 relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void and of no effect."

The appeal should be dismissed.

This and the preceding five pages comprise my reasons for Judgment in Port Jackson Stevedoring Pty.Ltd. v. Salmond and Spraggon (Australia) Pty.Ltd.

Sd: L.K. Murphy

In the High Court of Australia

No.13
Order
3rd April 1978

No. 13

ORDER - 3rd April 1978

IN THE HIGH COURT OF AUSTRALIA)
PRINCIPAL REGISTRY) No. 154 of 1976

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN: PORT JACKSON STEVEDORING PTY.LIMITED
Appellant (Defendant)

AND: SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED 10
Respondent (Plaintiff)

Before Their Honours The Chief Justice Sir Garfield Barwick, Mr. Justice Stephen, Mr. Justice Mason, Mr. Justice Jacobs and Mr. Justice Murphy.

Monday, 3rd April, 1978

This Appeal and Cross-Appeal from the judgment and order of the Court of Appeal of New South Wales given and made the 19th day of April, 1976 COMING ON FOR HEARING before this Court 20 at Sydney on the 17th day of March, 1977 AND UPON READING the transcript herein AND UPON HEARING Mr. R.W.R.Parker of Counsel for the appellant and Mr. C.S.C.Sheller Q.C. with Mr. J.M.N.Rolfe of Counsel for the Respondent THIS COURT DID ORDER that the matter should stand for judgment and the same standing for judgment accordingly this day at Sydney. THIS COURT DOTH ORDER that the Appeal and Cross-Appeal herein be and the same are hereby 30 dismissed AND THIS COURT DOTH FURTHER ORDER that the Appellant's costs of the Cross-Appeal be paid by the Respondent and that the Respondent's costs of the Appeal be paid by the Appellant.

BY THE COURT

Sd:

DEPUTY REGISTRAR

In the Privy Council

No.14
Order granting Final Leave to Appeal to Her Majesty in Council
15th November 1978

No. 14

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL - 15th November 1978

AT THE COURT AT BUCKINGHAM PALACE

The 15th day of November 1978

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

WHEREAS there was this day read at the Board
10 a Report from the Judicial Committee of the Privy Council dated the 7th day of November 1978 in the words following viz :-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Port Jackson Stevedoring Pty. Limited in the matter of an Appeal from the High Court of Australia between the
20 Petitioner and Salmond and Spraggon (Australia) Pty. Limited Respondent setting forth that the Petitioner prays for special leave to appeal from an Order of the High Court of Australia dated the 3rd April 1978 dismissing an Appeal by the Petitioner from an Order of the Supreme Court of New South Wales (Court of Appeal Division) which allowed an Appeal by the Respondent from a Judgment of the Supreme Court of New
30 South Wales (Common Law Division) dismissing an action for damages for loss of goods brought by the Respondent (Plaintiff) against the Petitioner and another (Defendants): And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal against the Order of the High Court of Australia dated the 3rd April 1978 and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience
40 to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that special leave ought to be granted to the Petitioner to enter and prosecute its

In the
Privy Council

No.14
Order granting Final Leave to Appeal to Her Majesty in Council

15th November 1978

(continued)

Appeal against the Order of the High Court of Australia dated the 3rd April 1978 on condition of lodging in the Registry of the Privy Council an undertaking to pay the costs of the Appeal in any event and to leave undisturbed the costs Order of the High Court:

"And Their Lordships do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same." 10

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution. 20

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

Sd: N.E.Leigh

BLUE STAR LINE, LTD 27 SOUTHBOUND

CANADA TO AUSTRALIAN AND NEW ZEALAND PORTS

(Space immediately below for shipping memorandum—not part of Bill of Lading)

THE ROBERT REFORD Co., Ltd
GENERAL AGENTS

INLAND CARRIER TO STEAMER: Dan Freightways Ltd.

CAR NUMBER—REFERENCE: R/1059

FORWARDING AGENT REFERENCES: Murray & Robinson Ltd., Toronto, Canada

EXPORT DEC. NO.

BILL OF LADING

SHIPPER: SCHICK SAFETY RAZOR COMPANY DIVISION OF EVERSHARP OF CANADA LTD.

CONSIGNED TO ORDER OF: SAMMOND & SPRAGGON (AUST.) PTY. LTD.

ADDRESS ARRIVAL NOTICE TO: CONSIGNEES AT: P.O. BOX 469 NORTH SYDNEY, N.S.W., 2060 AUSTRALIA.

ALSO NOTIFY

Without Liability to Carrier, See Clause

VESSEL: NEW YORK STAR | VOYAGE NO. | FLAG | PIER | PORT OF LOADING: ST. JOHN N.B.

PORT OF DISCHARGE (Where goods are to be delivered to consignee or on-carrier): SYDNEY, AUSTRALIA

FOR TRANSSHIPMENT TO (If goods are to be transshipped or forwarded at port of discharge)

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	MEASUREMENT	GROSS WEIGHT
S & S SYDNEY S-131/136 4-70C-2 024-70C-1 1/37	37	CARTONS RAZOR BLADES CLEAN ON BOARD FREIGHT PREPAID CONTRACT NO. SK-315 "LOCKER STOWAGE"	376 Cft.	4313 Lbs

PLEASE DELIVER The within mentioned goods in exchange for this Bill of Lading. Subject to safe arrival of vessel and to the terms and conditions of this Bill of Lading

WEIGHT .... MEASUREMENT 376'

Sorting & tacking charges paid $ 24:16

FREIGHT COLLECTED $

JOINT CARGO SERVICES PTY. LTD.

DATE 11/5/70 PER [signature]

...certify that the goods described herein were completely loaded on board the vessel...

MAR 27 1970 [signature]

PORT OF DESTINATION TO BE MARKED ON EACH PACKAGE IN LETTERS NOT LESS THAN TWO INCHES HIGH

SHIPPERS ARE REQUESTED TO NOTE PARTICULARLY THE TERMS AND CONDITIONS OF THIS BILL OF LADING WITH REFERENCE TO THE VALIDITY OF THE INSURANCE UPON THEIR GOODS.

FREIGHT AND CHARGES	RATE	TOTAL
GRAND TOTAL		

ORIGINAL

Accepting this Bill of Lading the Shipper, Consignee and the Owners of the goods, and the Holder of this Bill of Lading, agree to be bound by all of its conditions, exceptions and provisions whether written, printed or stamped on the front or back hereof.

In Witness whereof the Master, Purser or duly authorised Agent of the Carrier hath affirmed to Three Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void. As required by the Carrier or his Agents, one of the Bills of Lading must be given up, fully endorsed, in exchange for release or delivery order.

For the Master and the Owners of the ship named herein.

Dated in Montreal

By THE ROBERT REFORD CO. LTD. – Agents

Per [signature]

257 MO. DAY YEAR B/L No.

EXHIBITS

Plaintiff's Exhibits

"A"

Blue Star Line Bill of Lading No.27

27th March 1970

BLUE STAR LINE LTD.

AGENTS

RECEIVED from the Shipper hereinafter named, the goods or packages said to contain goods hereinafter mentioned, in apparent good order and condition unless otherwise indicated in this bill of lading to be transported subject to all the terms of this bill of lading with liberty to proceed via any port or ports within the scope of the voyage described herein to the port of discharge or so near thereunto as the ship can always safely get and leave, always afloat at all stages and conditions of water and weather, and there to be delivered or transhipped on payment of the charges thereon. If the goods in whole or in part are shut out from the ship named herein for any cause, the Carrier shall have liberty to forward them under the terms of the bill of lading.

It is agreed that the custody and carriage of the goods are subject to the following terms on the face and back hereof which shall govern the relations, whatsoever they may be, between the shipper, consignee, and the Carrier. Master and ship in every contingency, wheresoever and whensoever occurring, and also in the event of deviation, or of unseaworthiness of the ship at the time of loading or inception of the voyage or subsequently, and none of the terms of this bill of lading shall be deemed to have been waived by the Carrier unless by express waiver signed by a duly authorised agent of the Carrier.

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1. This Bill of Lading shall have effect subject to the provisions of the Water Carriage of Goods Act 1936 enacted by the Parliament of the Dominion of Canada, and the said Act shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities under the said Act. If any term of this Bill of Lading be repugnant to the said Act to any extent, such terms be void to that extent, but no further. Nothing herein contained shall prevent the carrier from claiming in the courts of any country the benefit of or derogate in any way from any statutory protection or limitation of liability afforded to shipowner or carrier by laws of such country or by the laws of

country in which the goods were shipped or discharged.

2. It is expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and without prejudice to the generality of the foregoing provisions in this Clause, every exemption limitation condition and liberty herein contained and every right, exemption from liability, defense and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading.

3. Goods may be stowed in poop, forecastle, deck house, shelter deck, passenger space or any other covered in space commonly used in the trade and suitable for the carriage of goods, and when so stowed shall be deemed for all purposes to be stowed under deck. Specially heated or specially cooled stowage is not to be furnished unless contracted for at an increased freight rate. Goods or articles carried in any such compartment are at the sole risk of the owner thereof and subject to all the conditions exceptions and limitation as to the Carrier's liability and other provisions of this bill of lading; and further the Carrier shall not be liable for any loss or damage resulting from the cargo being subjected to incorrect temperatures, risks of refrigeration, defects or insufficiency in or accidents to or explosions, breakage, derangement or failure of any refrigerator plant or part thereof, or by or in any material or the supply or use thereof used in the process of refrigeration unless shown to have been caused by

negligence of the Carrier from liability for which the Carrier is not by law entitled to exemption.

4. In the case of live animals and cargo which in this Bill of Lading is stated to be carried on deck and is so carried, the Carrier shall be under no liability whatsoever, whether or not loss or damage arise from fault or neglect of the Carrier his servants or Agents.

5. The Carrier's responsibility in respect of the goods as a carrier shall not attach until the goods are actually loaded for transportation upon the ship and shall terminate without notice as soon as the goods leave the ship's tackle at the Port of Discharge from Ship or other place where the Carrier is authorised to make delivery or end its responsibility. Any responsibility of the Carrier in respect of the goods attaching prior to such loading or continuing after leaving the ship's tackle as aforesaid, shall not exceed that of an ordinary bailee, and, in particular, the Carrier shall not be liable for loss or damage to the goods due to - flood: fire, as provided elsewhere in this bill of lading: falling or collapse of wharf, pier or warehouse: robbery, theft or pilferage: strikes, lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: any of the risks or causes mentioned in paragraphs (a), (e) to (l) inclusive and (k) to (p) inclusive, of subdivision 2 of section 1 of the Carriage of Goods by Sea Act of the United States; or any risks or causes whatsoever, not included in the foregoing, and whether like or unlike those hereinabove mentioned, where the loss or damage is not due to the fault or neglect of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any non-delivery or mis-delivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier.

6. The ship may proceed by any course whatsoever, and may, for the purpose of loading or discharging cargo, landing or disembarking passengers, repairing, drydocking, or any other purpose whatsoever, whether in connection with the present, a prior or subsequent voyage, proceed to and/or call and/or stay for any length of time at and/or return to any port or ports, place or places whatsoever, (including the port or place of loading) whether in or out of or in a contrary direction to or beyond the direct customary or advertised route (if any) to the port or place of delivery, in any order whatsoever, once or oftener, backwards or forwards, and may carry the goods past the port

or place of delivery either with or without first calling at such port or place: and may sail with or without Pilots or towage assistance, under sail or power and may render any form of assistance to vessels or aircraft, whether the same be in distress or not, in all situations. Further the Carrier may for any purpose whatsoever discharge the goods or any part thereof at any place whatsoever, whether before or after sailing from the port of loading and may land or store the same either ashore or afloat and/or may re-ship or trans-ship or forward the goods by the same or any other ship or ships or by craft or by rail, road or air. It is hereby expressly agreed that all such proceeding, callings, stayings, carriages, sailings, assistings, discharges, landings, storages, reshipments and forwarding are part of the agreed voyage and methods of conveyance.

EXHIBITS

Plaintiff's Exhibits

"A"

Blue Star Line Bill of Lading No.27

27th March 1970

(continued)

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7. In the case of the blockade, or interdict of the port of discharge or final destination of the goods shipped hereunder, or if the entering of or discharging (or continuance of discharging) in such port shall be prohibited or prevented or likely to be delayed by blockade, interdict, strikes, lockouts, labour troubles (whether the Carrier or his servants are parties thereto or not), civil commotion, riot, war, epidemic, fever or other illness, or any disturbances or any other cause whatsoever beyond the Carrier's control or shall be considered by the Master (whose decisions shall be absolute and binding on all parties) to be unsafe or to be likely to delay the vessel, then the goods may (at Carrier's option) be landed or put into lighters there or at the vessel's next port of call or, if the port of destination is the vessel's final port of discharge, then in the sole discretion of the Master at the nearest convenient port which shall be deemed to be substituted for the port of discharge named in this Bill of Lading and the Carrier's responsibility shall cease at the vessel's rail when the goods are so discharged, the Master or Agents giving immediate notice of such discharge to the Consignee of the goods so far as he is known. Such discharge shall constitute due delivery of the goods under this Bill of Lading and the owners of the goods shall bear and pay all charges and expenses incurred in consequence of such discharge, the Carrier, Master and Agent acting as forwarding agents only after the goods have left the vessel's rail.

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8. Delivery of the goods shall be taken by the consignee or holder of the Bill of Lading from the

vessel's rail immediately the vessel is ready to discharge, berthed or not berthed, and continuously as fast as vessel can deliver notwithstanding any custom of the port to the contrary. The Carrier shall be at liberty to discharge continuously day and night, Sundays and holidays included, all extra expenses to be for account of the Consignee or Receiver of the goods notwithstanding any custom of the port to the contrary. If the Consignee or holder of the Bill of Lading does not for any reason take delivery as provided herein, they shall be jointly and severally liable to pay the vessel on demand demurrage at the rate of one shilling and sixpence sterling per gross register ton per day or portion of a day during the delay so caused: such demurrage shall be paid in cash day by day to the Carrier, the Master or Agents. If the Consignee or holder of the Bill of Lading requires delivery before or after usual hours he shall pay any extra expense incurred in consequence. Delivery ex ship's rail shall constitute due delivery of the goods described herein and the carrier's liability shall cease at that point notwithstanding consignee receiving delivery at some point removed from the ship's side and custom of the port being to the contrary. The Carrier and his Agents shall have the right of nominating the Berth or Berths for loading and discharging at all ports and places whatsoever any custom to the contrary notwithstanding. The Carrier shall not be required to give any notification of disposition or arrival of the goods.

9. Unless otherwise stated herein, the description and particulars of the goods stated herein are those furnished in writing by the shipper and the Carrier shall not be concluded as to any thereof. The Carrier shall not be liable for failure to deliver in accordance with marks unless, before shipment, such marks shall have been clearly and durably stamped or marked upon the goods or packages, in letters and numbers at least 3 inches high and in all other respects in accordance with the recommendation given for marking of cargo by International Cargo Handling Coordination Association and International Standards Organisation. Goods that cannot be identified as to marks or numbers, cargo sweepings, liquid residue and any unclaimed goods not otherwise accounted for shall be allocated for completing delivery to the various consignees of goods of like character, in proportion to any apparent shortage, loss of weight or damage, and the consignee shall accept the same. Loss or damage to goods in bulk stowed without separation

from other goods in bulk of like quality, shipped by either the same or another shipper, shall be divided in proportion among the several shipments. The Carrier is not responsible for loss ofweight in packages from which samples have been taken.

EXHIBITS

Plaintiff's Exhibits

"A"
Blue Star Line Bill of Lading No.27

27th March 1970

(continued)

10. The Shipper, the Consignee and the goods shall be liable for all expenses of mending, cooperage, haling or reconditioning of the goods or packages and gathering of loose contents of
10 packages, also for any payment, expense, fine dues, duty, tax, impost, loss, damage or detention sustained or incurred by or levied upon the Carrier or the ship in connection with the goods, howsoever caused, including any action or requirements of any government or governmental authority or person purporting to act under the authority thereof, seizure under legal process or attempted seizure, incorrect or insufficient marking, numbering or addressing of packages or
20 description of the contents, failure to procure Consular, Board of Health, or other certificates or licenses to accompany the goods or to comply with laws or regulations of any kind imposed with respect to the goods by the authorities at any port or place or any act or omission of the Shipper or Consignee.

11. Where goods are carried on through Bills of Lading, in case of damage or short delivery or other claim, the actual carrier in whose custody
30 the goods were, at the time of the damage or short delivery arising shall alone be responsible, a through freight being given for the convenience only. The above exceptions always apply to the transit, whether the goods be on ship, craft, hulk, on shore, or elsewhere and each carrier's liability is further limited by any terms not included in the above which are contained in the usual form of Bill of Lading or contract of carriage in use by the carrier against whom
40 the claim is made. If, owing to strikes, lockouts or labour disturbances at port of transhipment or at ports of destination, or to any cause beyond the control of the Carrier or his Agents, the goods shall be delayed at the port of transhipment beyond the period which would elapse before transhipment in normal circumstances the storage and other charges upon the goods after the expiration of the normal period shall be borne by the Consignor or Owner of the goods. The Carrier has the right to forward in lots
50 or parts. In the event of theon-carrying service from the port of discharge to the intended destination of the goods being terminated or suspended before completion of transhipment,

EXHIBITS

Plaintiff's Exhibits "A"
Blue Star Line Bill of Lading No.27
27th March 1970
(continued)

delivery of the goods shall, at the carrier's request, be taken at ship's rail at the port of discharge. Such delivery shall constitute complete fulfillment of the contract of carriage.

12. Freight shall be payable on actual intake weight or measurement or, at Carrier's option, on actual discharge weight or measurement. Freight may be calculated on the basis of the particulars of the goods furnished by the Shipper, but the Carrier may at any time open the packages and examine, weigh measure and value the goods. In case Shipper's particulars are found to be erroneous and additional freight is payable the goods shall be liable for any expense incurred for examining, weighing measuring and valuing the goods. Full freight shall be paid on damaged or unsound goods. Full freight for the said goods shall be due and payable on shipment or on discharge at port of destination in accordance with statement in this Bill of Lading, and shall be completely earned on receipt of the goods by the Carrier and is to be paid in cash without deduction, vessel or cargo lost from any cause whatsoever or not lost.

13. The Carrier, the Master, or the Ship's Agent shall have a lien upon all goods for freight (payable in advance or not), dead freight, demurrage, or loss caused by detention and for all payments made or liabilities incurred in respect of any fines, charges, or expenditure stipulated herein to be borne by the shippers, consignees, or owners of the goods and also for all previously unsatisfied freights and charges.

14. Neither the carrier nor any corporation owned by, subsidiary to or associated or affiliated with the Carrier shall be liable to answer for or make good any loss or damage to the goods occurring at any time and even though before loading on or after discharge from the ship, by reason or by means of any fire whatsoever, unless such fire shall be caused by its design or neglect.

15. In the case of any loss or damage to or in connection with goods exceeding in actual value per package, or in case of goods not shipped in packages, per freight unit, the value of the goods shall be deemed to be five hundred dollars per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any, shall be determined

on the basis of a value of five hundred dollars per package or per freight unit, or pro rata in case of partial loss or damage, unless the nature of the goods and a valuation higher than five hundred dollars shall have been declared in writing by the shipper upon delivery to the Carrier and inserted in this Bill of Lading and extra freight paid if required and in such case if 10 the actual value of the goods per package or per freight unit shall exceed such declared value, the value shall nevertheless be deemed to be the declared value and the Carrier's liability, if any, shall not exceed the declared value and any partial loss or damage shall be adjusted pro rata on the basis of such declared value.

EXHIBITS

Plaintiff's Exhibits

"A"

Blue Star Line Bill of Lading No.27

27th March 1970

(continued)

Whenever the value of the goods is less than $500 as the case may be per package or other 20 freight unit, their value in the calculation and adjustment of claims for which the Carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value, be deemed to be the invoice value, plus freight and insurance to the extent that they are paid and irrecoverable, irrespective of whether any other value is greater or less. Each article or piece of merchandise other than goods shipped in bulk, 30 which is not stated, boxed or otherwise protected shall be considered a separate package under this bill of lading and under Article IV rule 5 of the Water Carriage of Goods Act 1936 or the corresponding provision of any other Carriage of Goods by Sea Act that may be applicable.

16. Unless notice of loss or damage and the general nature of such loss or damage is given in writing to the Carrier or his agent at the 40 port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the Carrier of the goods as described in the bill of lading. If the loss or damage is not apparent the notice must be given within three days of the delivery. The Carrier shall not be liable upon any claim for loss or damage unless written 50 particulars of such claim shall be received by the Carrier within thirty days after receipt of the notice herein provided for.

17. In any event the Carrier and the ship shall

EXHIBITS

Plaintiff's Exhibits

"A"
Blue Star Line Bill of Lading No.27

27th March 1970

(continued)

be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear.

18. Should in the case of war or otherwise any Government or authorities interfere with the ship's voyage in any way before or after the commencement of the voyage, the Carrier shall have the liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, transhipment, discharge, or destination, or otherwise, howsoever given by any Government or any department thereof or by any person acting or purporting to act with the authority of any Government or any department thereof or by any War Risks Insurance Association which the ship may be entered or any other authority, Official or Semi-Official Committee, and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation. In the event of the goods or any portion thereof having, as a result of the above to be landed or otherwise dealt with at a port or place other than Bill of Lading destination the Carrier's liability shall cease upon discharge of the within-mentioned goods at such port or place concerned, notwithstanding anything herein contained to the contrary and the full freight indicated on the face hereof shall become due and shall be paid together with any expenses which the Carrier shall incur or become liable for arising out of landing or transhipment and/or forwarding.

19. In case of accident, danger, damage or disaster, before or after commencement of the voyage, resulting from any cause whatsoever whether due tc negligence or not, for which or for the consequence of which, the Carrier is not responsible by statute, contract or otherwise, the cargo, its owners, shippers or consignees shall contribute with the Carrier in General Average to the payment of any sacrifices losses or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo and if the salving vessel is owned or operated by the Carrier, salvage shall be paid as fully as if the

salving vessel was owned or operated by strangers. Before delivery of the cargo, consignees shall make with the Carrier a deposit in cash or give a guarantee satisfactory to the Carrier at the latter's option in such amount as the Carrier may deem sufficient to cover the estimated contribution of the cargo and the special charges thereon. General Average to be adjusted in United States or at any port of discharge or other place at the option of the Carrier, in accordance with York/Antwerp Rules, 1950, except Rule XXII thereof.

In such adjustment disbursements in foreign currencies shall be exchanged into the currency of the place of adjustment at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security as may be required by the Carrier must be furnished before delivery of the goods. Such cash deposit as the Carrier or its agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if required, be made by the goods, shippers, consignees or owners of the goods to the Carrier before delivery. Such deposit shall at the option of the Carrier, be payable in United States money and shall be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the General Average, and refunds or credit balances, if any, shall be paid either in United States money or in the currency of the place of adjustment, at the option of the Carrier.

20. If the carrier's vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, neglect or default of the master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the Carrier's vessel, the owners of the Cargo carried hereunder will indemnify the Carrier against all liability to the other or non-carrying vessel or her owners in so far as such liability represents loss of or damage to, or any claim whatsoever of the owners of said cargo paid or payable by the other or non-carrying vessel or her owners to the

EXHIBITS

Plaintiff's Exhibits

"A"
Blue Star Line Bill of Lading No.27

27th March 1970

(continued)

owners of said cargo and set off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying vessel.

21. As far as available space and stowage permit, vessel has additional liberty, before completion of discharge of her present outward cargo, to load cargo for her return voyage at the outward discharging ports or at other ports in Australia and New Zealand, in or out of the usual course of the voyage, and also to load and discharge coastal and inter-colonial cargo to such ports, in or out of the usual course of the voyage, and nothing done in pursuance of the liberty granted under this clause shall be deemed to constitute a deviation. 10

Order No. 024-70C-2
026-70C-1

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EXHIBITS

Plaintiff's Exhibits "B"

Customs Invoice

13th March 1970

Schick Safety Razor Co., div. of
Eversharp of Canada Limited,
149 Bartley Drive,
Toronto 375, Ontario.

March 13, 1970

Reference number S-131/136

Page 1 of 1 pages

Consignee

Salmond & Spraggon (Aust.) Pty. Ltd.,
104-108 Mount Street,
North Sydney, N.S.W.2060,
AUSTRALIA.

Purchaser (if not Consignee)

FOR OFFICIAL USE ONLY

Country of Origin: Canada

Country to which consigned: Australia

Place and Country from which consigned: Toronto, Canada

Ship/Aircraft, etc.: M/V New York Star

Port of Loading: St. John, N.B.

Port of Discharge: Sydney

Final Destination of Goods: Sydney

Conditions of Sale (e.g. FOB, CIF, Consignment, etc. and details of discount and any other special arrangements): 60 days net, 2%-30 days after arrival of merchandise C.I.F. SYDNEY

Current Domestic Value in currency of exporting country at factory/warehouse/port of shipment* subject to cash discount already deducted/not deducted*.

RATE OF CASH DISCOUNT 2 %

*Delete as necessary

Marks and numbers, number and kind of packages; description of goods

S & S Sydney, S-131/136, 024-70C-2, 026-70C-1, 1/37

Origin	Description	Quantity (state unit)	Selling Price to Purchaser @	Amount	Current Domestic Value @	Amount
		Blades	Per M	Cdn.	Per M	Cdn.
Canada C	Schick Krona Chrome Double Edge Dispenser 8's Safety Razor Blades #1780 (864 doz.)	82,944	60.06	4,981.62	98.96	8,208.14
Canada C	Schick Krona Chrome Double Edge Dispenser 4's Safety Razor Blades #744 (3672 doz.)	176,258	70.19	12,371.55	110.21	19,425.39
		DOZ.	PER DOZ		PER DOZ	
Canada C	Schick Double Edge Safety Razors w/Schick S.S. Safety Razor Blade Dispenser 2's (1C) #274	210	8.52	1,789.20	11.48	2,410.80
Canada A	Empty Corrugated Cardboard Cartons	1573 only	N/C	No Charge		172.69
	C.I.F. SYDNEY - CANADIAN DOLLARS			$19,142.37		
	Converted to Australian Dollars at agreed rate of Australian $1.00 = $1.19 Canadian					
	TOTAL AUSTRALIAN DOLLARS			$16,086.25		

We hereby certify that Sales Tax and Drawback amounting to $4,598.50 has been included in the above Current Domestic Value and remission of same is allowable on exportation of these goods to Australia.

	SALES TAX	DRAWBACK
Item 1	$1,368.02	$224.17
2	2,081.29	476.37
3	258.30	190.35

H. Jenkins, Chief Clerk.

The following air freight, inland freight and insurance charges are included in the above C.I.F. charges.

Ocean Freight	919.88
Inland	144.48
Insurance	77.02

TOTAL $19,142.37 TOTAL $30,217.02

Enumerate the following charges and state if such amount has been included in the total Selling Price to Purchaser and Current Domestic Value	Selling Price to Purchaser: Amount (state currency)	State if included	Current Domestic Value: Amount in currency of exporting country	State if included
1 Value of outside packages/containers	Cdn.		37.00	incl.
2 Labour in packing goods into outside packages/containers			27.75	incl.
3 Inland transport and insurance charges to dock/airport area				
4 Dock and port charges				
5 Overseas freight				
6 Overseas insurance				
7 Details of any other charges relating to delivery of goods				
8 Drawback or remission of duty or taxes				
9 Any other information				

I, THE UNDERSIGNED, being duly authorised in that behalf by the above seller, and having made the necessary enquiries, HEREBY CERTIFY THAT THIS INVOICE, including continuation sheets, if any, IS MADE IN ACCORDANCE WITH THE VALUE AND ORIGIN CLAUSES PRINTED OVERLEAF, and hereby declare that I will furnish to the Customs authorities of the importing country or their nominee, for inspection at any time, such accounts and other evidence as they be requested for the purpose of verifying this certificate.

Place and Date: Toronto, Canada; March 13, 1970

Full name and business designation of signatory: H. Jenkins, Chief Clerk.

EXHIBITS

Plaintiff's Exhibits

"B"

Customs Invoice

13th March 1970

(continued)

APPENDIX D1

Value and Origin Clauses to be Written, Typewritten, or Printed on Invoices of Goods for Exportation to the Commonwealth of Australia, for which Entry is Claimed at Preferential Rates

VALUE AND ORIGIN OF CLAUSES

(1) That this invoice is correct in all respects and contains a true and full statement of the quantity and description of the goods and of the price actually paid or to be paid for them or, in the case of goods on consignment, the price which would have had to be paid by a purchaser in Australia had the goods been sold to an Australian importer instead of being consigned for sale in Australia.

(2) No different invoice of these goods has been or will be furnished to anyone.

(3) No arrangement or understanding affecting the purchase price of these goods, by way of discount, rebate, compensation, or of any other nature whatsoever which is not fully shown in this invoice, has been or will be made or entered into by the said seller and the purchaser, or by anyone on behalf of either of them.

(4) The domestic values shown in the column headed 'Current Domestic Values in Currency of Exporting Country' are those at which the said seller is selling or would be prepared to sell for cash at the date of exportation of the goods the same quantity of identically similar goods to any and every purchaser for home consumption in the country of exportation.

(5) The said domestic value includes any duty leviable in respect of the goods before they are delivered for home consumption, and on exportation a drawback or remission of duty or taxes as shown on the table overleaf has been or will be allowed by the revenue authorities in the country of exportation.

(6) All goods marked 'A' in the column headed 'Origin Code' have been either wholly produced or wholly manufactured in the said country of origin. As to manufactured goods, such goods have been either wholly produced or wholly manufactured in the said country of origin from materials in one or more of the following classes:

(i) unmanufactured raw products;

(ii) materials wholly manufactured in the country of origin or in Australia, or in the country of origin and in Australia; and

(iii) imported materials that the Minister has, in relation to the country of origin, determined, by notice published in the Gazette, to be manufactured raw materials.

(7) With respect to goods marked 'B' in the column headed 'Origin Code', not less than three-quarters of the factory or works cost (see clause (10) below) of each and every such article in its finished state is represented:

(i) by labour or material of the country of origin; or

(ii) by labour or material of the country of origin and labour or material of Australia.

(8) With respect to goods marked 'C' in the column headed 'Origin Code',

(a) not less than one-quarter of the factory or works cost (see clause (10) below) of each and every such article in its finished state is represented:

(i) by labour or material of the country of origin, or

(ii) by labour or material of the country of origin and labour or material of Australia.

(Note - Goods will not qualify for preference under this category unless they are goods which are deemed to be goods of a class or kind not commercially manufactured in Australia; a list of such goods is given in Appendix I of explanatory pamphlet on preference.) or,

(b) in the case of adding and adding-calculating machines, textile piece goods whether woven or knitted, composed of the following materials, viz:

Admixtures of cotton, silk or man-made fibres,
Cotton,
Man-made fibres, or
Silk

and typewriters (including covers), or such other goods in respect of which the Minister has determined that one-half shall be substituted for one-quarter, not less than one-half of the factory or works cost (see clause (10) below) of each and every article in its finished state is represented:

(i) by labour or material of the country of origin, or

(ii) by labour or material of the country of origin and labour or material of Australia.

(Note - Goods will not qualify for preference under this category unless they are goods which are deemed to be goods of a class or kind not commercially manufactured in Australia, see Appendix I of explanatory pamphlet on the preference.)

(9) That in regard to all of the goods marked 'A', 'B' or 'C', the final process of manufacture of each and every article has been performed in the country of origin.

(10) In the calculation of such proportion of factory or works cost attributable to the cost of labour and/or materials received in the country of origin and Australia none of the following items has been included [illegible] excise duty or any tax paid or [illegible] [illegible] agent, broker or [illegible]

EXHIBITS

"B"

COMMERCIAL INVOICE
No.029-700 - 13th March 1970

EXHIBITS

Plaintiff's Exhibits

"B"
Commercial Invoice No.029-700

13th March 1970

SCHICK SAFETY RAZOR COMPANY
Division of Eversharp of Canada Ltd.
149 BARTLEY DRIVE, TORONTO 16, CANADA

Order from: Salmond & Spraggon (Aust.) Pty.Ltd.
P.O.Box 469,
North Sydney, N.S.W., 2060
Australia

Charge to: Same

Shipped to: Same

Terms: 60 days net, 2%-30 days after arrival of merchandise

Invoice No: 029-700
Date: March 13 1970
Our Order No: 024-70C-2
026-70C-1
Your Order No: S-131/136 & Letter No.9
Via: Ocean Freight
Shipped from: Canada
Marks: S & S Sydney
S-131/136
024-70C-2
026-70C-1
1/37

QUANTITY	DESCRIPTION	UNIT PRICE	DISCOUNT	NET	TOTAL
BLADES	024-70C-2(S-131)	PER M			
82,944	Krona Chrome Double Edge Dispenser 8's Safety Razor Blades # 1780 (864 doz.)	60.06		4,981.62	
176,258	Krona Chrome Double Edge Dispenser 4's Safety Razor Blades # 744 (3672 doz.)	70.19		12,371.55	
DOZENS	026-70C-1 (S-136)	PER DOZ			
210	Schick Double Edge Safety Razors w/Schick S.S.Safety Razor Blade Dispenser 2's (1C) # 274	8.52		1,789.20	
	Letter No.9				
1573 only	Corrugated Cardboard Cartons for Pack Nos: XT303; 1304; 802; 1804; 402; 1404; XT305;1649 (Value - $172.69)	N/C		No Charge	

EXHIBITS

Plaintiff's Exhibits "B" Commercial Invoice No.029-700 13th March 1970 (continued)

QUANTITY	DESCRIPTION	UNIT PRICE	DIS-COUNT	NET	TOTAL

C.I.F. SYDNEY - Canadian Dollars $19,142.37

** Converted to Australian Dollars at agreed rate of Australian $1.00 = $1.19 Canadian

Total Australian Dollars $16,086.25

Packing list of Eversharp of Canada Limited

PACKING LIST

EVERSHARP OF CANADA LTD. EXPORT DEPT.

NAME: Salmond & Spraggon (Aust.)Pty.Ltd.

ADDRESS: P.O.Box 469, North Sydney, N.S.W. 2060, Australia

ORDER NO: 024-70C-2 026-70C-1

DATE: March 13, 1970

MARKS: S & S Sydney S-131/136 024-70C-2 026-70C-1 1/37

CARTON NUMBER	DZ PER CARTON	CONTENT DES-CRIPTION	GROSS LBS.	GROSS KILOS	LEGAL LBS.	LEGAL KILOS	DIMEN-TIONS
1-7	30	Schick Double Edge Safety Razors w/Schick S.S.Safety Razor Blade Dis-penser 2's (1C)# 274	119½	54	112½	51	24"x29"x32"
8-13	144	Krona Chrome Double Edge Dispenser 8's Safety Razor blades # 1780	93¼	42	88¼	40	29"x19¼"x21"
14	200	Corrugated Cartons for 1804					
	30	Corrugated Cartons for XT303	132½	60	125½	57	24"x29"x32"
15	227	Corrugated Cartons for XT303					
	90	Corrugated Cartons for 402	129½	59	122½	55	24"x29"x32"

EXHIBITS

Plaintiff's Exhibits "B"
Packing list of Eversharp of Canada Ltd
13th March 1970 (continued)

CARTON NUMBER	DZ PER CARTON	CONTENT DESCRIPTION	GROSS LBS.	GROSS KILOS	LEGAL LBS.	LEGAL KILOS	DIMENSIONS
16	200	Corrugated Cartons for 802					
	10	Corrugated Cartons for 402					
	43	Corrugated Cartons for XT303					
	60	Corrugated Cartons for 304	130-¾	60	123-¾	56	24"x29"x32"
17	116	Corrugated Cartons for 1304					
	200	Corrugated Cartons for XT305					
	25	Corrugated Cartons for 1404	149¼	69	142¼	64	24"x29"x32"
18	52	Corrugated Cartons for 1304					
	76	Corrugated Cartons for 1404					
	68	Corrugated Cartons for 1649	123½	56	116½	53	24"x29"x32"
19	72	Corrugated Cartons for 1649					
	24	Corrugated Cartons for 1304	68¼	31	63¼	29	28½"x19½"x21¼"
20	68	Corrugated Cartons for 1649					
	32	Corrugated Cartons for 1304	62¼	28	57¼	26	28½"x19½"x21¼"
21-37	216 Dozen	Krona Chrome Double Edge Dispenser 4's Safety Razor Blades # 744	124-¾	57	118-¾	54	27¼"x22¼"x28¼"
		Total Gross Weight	4,312-¾				375.7 cu.ft.

EXHIBITS

"C"

COPY LETTER OF L.F. FERRIS & COMPANY
TO FIRSTNAMED DEFENDANT - 1st July 1970

L. F. FERRIS & COMPANY
Asbestos House, 67 York Street, Sydney

In reply please
quote: LFF:338 1st July 1970

Joint Cargo Services,
56 Pitt Street, 10
SYDNEY, N.S.W. 2000

Owners or Agents "New York Star" (reported 9/5/1970) to claim on Pillage from three (3) Cartons and thirty-three (33) Cartons shortlanded.

MARKS & No.s	PILLAGE	
S & S S-131/136 024-70C-2 026-70C-1 SYDNEY Nos. 1-14 16-37	C/No.29-93 3/12 Doz. Krona Chrome Dispenser 4's (art.744) @ 70.19 C per 1000 CIF i.e., 4476 Blades	= 314.17
	C/No.25-3 5/12 Doz. Krona Chrome Dispenser 4's (art.744) @ 70.19 C per 1000 CIF i.e., 164 Blades	= 11.51
	C/No.3-1 Doz Razor & Blades (art.274) @ C 8.52 per Doz.	= 8.52
	SHORTLANDED	
	C/Nos. 1-2, 4-7 each 30 Doz. Razor & Blades (art.274) @ C 8.52 per Doz. i.e., 180 Doz.	= 1533.60
	C/Nos.14, 16-20 corrugated cartons for packing Razor Blades	= 158.50
	C/Nos.8-13 each 144 Doz. Krona Chrome Dispenser 8's (art.1780) @ 60.06 C per 1000 i.e., 82944 Blades	= 4981.62
	C/Nos.21-24, 26-28, 30-37 each 216 Doz. Krona Chrome Dispenser 4's (art.744) @ C 70.19 per 1000 i.e., 155,520 Blades	= 10915.95
	@ 1.1978	17923.87

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IMPORTER: SALMOND & SPRAGGON (AUST.)PTY.LIMITED

EXHIBITS

"C"

COPY LETTER OF FIRSTNAMED DEFENDANT TO L.F.FERRIS AND COMPANY - 20th August 1970

EXHIBITS

Plaintiff's Exhibits

"C"

Copy Letter of First-named Defendant to L.F.Ferris & Company

20th August 1970

JOINT CARGO SERVICES PTY. LIMITED

Royal Exchange Building,
56 Pitt Street,
Sydney, N.S.W. 2000

10 Agent for:
AUSTASIA LINE LTD.
BLUE STAR LINE LTD.
ELLERMAN & BUCKNALL STEAMSHIP CO.LTD.
FORT LINE LTD.

20th August 1970

Messrs. L.F.Ferris & Company,
67 York Street,
SYDNEY, N.S.W. 2000

Dear Sirs,

20 M.V. "NEW YORK STAR" Voy.16

We refer to your Claim dated 1st July, 1970, which in part, covers a claim against the above-named Vessel for the equivalent of $A.14,684.98 being the value of thirty-three (33) Cartons Razor Blades short received from this Vessel on behalf of your clients, Salmond & Spraggon (Aust.) Pty. Limited.

You are already fully aware of the fact that the thirty-three (33) Cartons concerned
30 were landed from the Vessel and were subsequently illegally removed from the wharf.

We very much regret this unfortunate occurrence. However, under the terms and conditions of the carrier's Bill of Lading we must on behalf of those concerned repudiate liability and suggest the matter be referred to underwriters.

Yours faithfully,
JOINT CARGO SERVICES PTY. LIMITED
As Agents.
40 Sd: W.N.Loomes
(W.N.Loomes)
CLAIMS DEPARTMENT

c.c. Messrs. Ebsworth & Ebsworth.

EXHIBITS

Plaintiff's Exhibits

"D"

First page of Cargo Delivery Book of first-named Defendant together with entry described as "St.John 347" under the letter S in the Cargo Delivery Book

Undated

EXHIBITS

"D"

FIRST PAGE OF CARGO DELIVERY BOOK OF FIRSTNAMED DEFENDANT TOGETHER WITH ENTRY DESCRIBED AS "ST.JOHN 347" UNDER THE LETTER S IN THE CARGO DELIVERY BOOK - Undated

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"NEW YORK STAR" VOYAGE 16

BERTH 2 GLEBE IS.

10

COMMENCED DISCHARGE	10. 5. 70	
COMPLETED DISCHARGE	17. 5. 70	
SURVEY	20. 5. 70	CART. WHITE
STORAGE	21. 5. 70	
BONDING	28. 5. 70	
PAPERS RETURNED	3. 6. 70	

BRISBANE CARGO RETURNED BY ROAD SEE REPORT

Exhibit "D"
Second Page Illegible.

	No.	Consignee	Qty	Description	Date	Vessel		Entries	Total
1.	X283	S.K.F.	(105)	C/s Parts for Steel Roller Bearings etc. 34/101 - 1/100 34/109 5&503 4/1-7 34742 -1-2	19/5	L.S. Class	own	3654/139	(139)
		———	(34)	C/s Steel Roller Bearings 3419 - 1/34					
✓	X289	SPICERS 5346	(10)	C/s Printing Paper 1/10	11/5	F. Bridland	own	3651/10	(10)
✓	X295	C SKF B C #4 S	(29)	C/s Steel Ball Bearings 3416 - 1/29	13/5	Robt Bamber	own	3819/24 3855/5	(29)
✓	X298	SPICERS 178-32A	(72) (90) (76)	Ctns Board Clay Coated 1A/K0A; Ctns; Ctns 1/76	13/5	F. Bridland	own	3765/127 3768/109 3772/2	(238)
ST. JOHN	X326	SELLERS FABRICS PTY. LTD	(37)	Ctns Upholstery Yarn	22/5	Brambles	own	3738/37	(37)
✓	X341	SWIFT N8205	(28)	Pallets Lignosol SF Used to Contain 1176 Bags	26/5	Swift & Co.	Brambles	3785/14 3688/14	(28)
	X347	S & S S #4	37	Ctns Razor Blades 1/37	14/5	[illegible]	Pamble	3721/4	4 — 33 CARTONS ILLEGALLY REMOVED FROM WHARF.
SAVIDNAY	362	SUMMER INSTITUTE OF LINGUISTICS LAE	X	Drums Printing Plates			SEE TRANSHIPMENT.		
TAMFA	369	S.O.C.	10000	F/ctns Grapefruit Juice	11/5	Saint & Riley	Butler & Norman	3823/500 3563/560 3741/324 355_/_ 3537/1296 3547/1296 3552/500 3558/576 3551/1296 3856/576 3866/792 3870/510 3640/134	4916 3440 644 — 9000; 1000 Landed Brisbane
	SURPLUS	SOC MELBOURNE	(1000)	F/ctns Grapefruit Juice	14/5	Saint & Riley	Chalmers	3549/800 3552/200	(1000)
	SURPLUS	SOC	(1)	F/ctn. Printed Labels	26/5	———	———	3767/1	(1)

T U V W X Y Z

000100

EXHIBITS

"E"

COPY NOTICE TO ADMIT FACTS
TO FIRSTNAMED DEFENDANT
11th October 1974

EXHIBITS

Plaintiff's Exhibits

"E"

Copy Notice to Admit Facts to Firstnamed Defendant

11th October 1974

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 5033 of 1971

BETWEEN: SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED

Plaintiff

AND: JOINT CARGO SERVICES PTY. LIMITED and PORT JACKSON STEVEDORING PTY. LIMITED

Defendants

NOTICE TO ADMIT FACTS

TAKE NOTICE that the Plaintiff herein calls upon the firstnamed Defendant to admit for the purpose of these proceedings only the following facts:

1. That the 33 cartons, the subject of this action, were at all material times the property of the plaintiff.

2. That the first defendant was at all material times the ship's agent for the owners of the "New York Star".

3. That the second defendant was the stevedore engaged in unloading the "New York Star" after its arrival at the Port of Sydney on the 9th May, 1970.

4. That the said goods were delivered on or after the 9th May, 1970 to the first defendant.

5. That the said goods were delivered on or after the 9th May, 1970 to the second defendant.

6. That the said cartons and their contents were delivered as aforesaid in sound condition.

7. That the said goods were delivered on or about the 12th May to :

(a) the first defendant;
(b) the second defendant.

EXHIBITS

Plaintiff's Exhibits

"E"

Copy Notice to Admit Facts to Firstnamed Defendant

11th October 1974

(continued)

8. That the said goods were not delivered by the defendants or either of them to the plaintiff.

9. That on or about the 14th May, 1970 the said goods were taken from the custody of the first defendant.

10. That on or about the 14th May, 1970 the said goods were taken from the custody of the second defendant.

11. That on or about the 14th May, 1970 the said goods were delivered by the first defendant to a person or persons unknown.

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12. That on or about the 14th May, 1970 the said goods were delivered by the second defendant to a person or persons unknown.

13. That the said goods were so delivered to a person or persons unknown without the authority of the plaintiff and to a person or persons having no title or claim to possession of the said goods or any of them.

20

14. That the said goods were lost as a result of the negligence of the first defendant.

15. That the said goods were lost as a result of the negligence of the second defendant.

16. That the value of the said goods on the 14th May, 1970 was $14,684.98.

17. That the rate of exchange between the Canadian and Australian dollar on the 14th May, 1970 was 1.1978 Canadian dollars to 1 dollar Australian.

DATED this 11th day of October 1974

30

Sd: M. Thomson

Solicitor for the Plaintiff

EXHIBITS

"E"

LETTER FROM EBSWORTH & EBSWORTH
TO KEARNEY BOYD AND JOHNS
15th October 1974

EXHIBITS

Plaintiff's Exhibits

"E"

Letter from Ebsworth & Ebsworth to Kearney Boyd & Johns

15th October 1974

EBSWORTH & EBSWORTH
Solicitors
P & O Building, 55 Hunter Street,
Sydney

Our ref: PBT.RM
Your ref: MET.JS 15th October 1974

Messrs. Kearney, Boyd & Johns,
Solicitors,
C.D.E. 388

Dear Sirs,

JOINT CARGO SERVICES PTY. LIMITED and PORT JACKSON STEVEDORING PTY. LIMITED ats SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED - SUPREME COURT ACTION NO. 5033 OF 1971

We acknowledge receipt of your letter of 11th October, 1974.

We have conferred with Counsel as to evidence and as to the matters raised in your letter. We consent to the amendment of the Declaration. However, you will appreciate that it will be necessary for Counsel to consider the amendments to the first Defendant's Pleas. You have also mentioned that the second-named Defendant intends to amend its Plea. At the moment, we have no copy of the proposed amendments and it would seem to us that some time may well elapse in putting these matters in order and we trust this can take place within a reasonable period prior to the Hearing. If so, we would certainly consent to the filing of amended Issues without the necessity of a formal application for amendment of the Pleadings.

We note your comment that our client's List of Documents is not complete. We are writing to our client today to try to trace the documents you have mentioned. We will certainly comply with the Notice to Produce so far as it is in our power to do so, and we also give this undertaking on behalf of our client.

EXHIBITS

Plaintiff's Exhibits

"E"

Letter from Ebsworth & Ebsworth to Kearney Boyd & Johns

15th October 1974

(continued)

We now deal with your Notice to Admit Facts. We reply to the numbered paragraphs as follows :-

1. No.
2. Yes.
3. Yes.
4. & 5. No.
6. Admitted, subject to the omission of the words "as aforesaid".
7./16. No.
17. The rate will be admitted after we have had an opportunity of checking it.

10

So far as item 16 is concerned, we are prepared to consider the omission provided you place appropriate evidence before us as soon as possible as to the value of the goods.

You will appreciate that the consent to the amendment of the Declaration and consequential Pleadings is made subject to your client agreeing to bear the costs involved.

20

Yours faithfully,

EXHIBITS

"F"

COPY NOTICE TO ADMIT FACTS
TO SECONDNAMED DEFENDANT
10th October 1974

IN THE SUPREME COURT OF NEW SOUTH WALES) No. 5033 of 1971

BETWEEN: SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED
Plaintiff

10

AND: JOINT CARGO SERVICES PTY. LIMITED and PORT JACKSON STEVEDORING PTY. LIMITED
Defendants

NOTICE TO ADMIT FACTS

TAKE NOTICE that the Plaintiff herein calls upon the secondnamed Defendant to admit for the purpose of these proceedings only the following facts :

20

1. That the 33 cartons, the subject of this action, were at all material times the property of the Plaintiff.

2. That the first Defendant was at all material times the ship's agent for the owners of the "New York Star".

3. That the second Defendant was the stevedore engaged in unloading the "New York Star" after its arrival at the Port of Sydney on the 9th May, 1970.

30

4. That the said goods were delivered on or after the 9th May, 1970 to the first Defendant.

5. That the said goods were delivered on or after the 9th May, 1970 to the second Defendant.

6. That the said cartons and their contents were delivered as aforesaid in sound condition.

7. That the said goods were delivered on or about the 12th May to :-

(a) the first Defendant;
(b) the second Defendant.

EXHIBITS

Plaintiff's Exhibits

"F"

Copy Notice to Admit Facts to Secondnamed Defendant

10th October 1974

(continued)

8. That the said goods were not delivered by the Defendants or either of them to the Plaintiff.

9. That on or about the 14th May, 1970 the said goods were taken from the custody of the first Defendant.

10. That on or about the 14th May, 1970 the said goods were taken from the custody of the second Defendant.

11. That on or about the 14th May, 1970 the said goods were delivered by the first defendant to a person or persons unknown. 10

12. That on or about the 14th May, 1970 the said goods were delivered by the second Defendant to a person or persons unknown.

13. That the said goods were so delivered to a person or persons unknown without the authority of the Plaintiff and to a person or persons having no title or claim to possession of the said goods or any of them.

14. That the said goods were lost as a result of the negligence of the first Defendant. 20

15. That the said goods were lost as a result of the negligence of the second Defendant.

16. That the value of the said goods on the 14th May, 1970 was $14,684.98.

17. That the rate of exchange between the Canadian and Australian dollar on the 14th May, 1970 was 1.1978 Canadian dollars to 1 dollar Australian.

DATED this 10th day of October 1974 30

Sd: M. Thomson

Solicitor for the Plaintiff

EXHIBITS

"F"

COPY NOTICE DISPUTING FACTS BY SECONDNAMED DEFENDANT - 4th March 1975

IN THE SUPREME COURT OF NEW SOUTH WALES No. 5033 of 1971

BETWEEN: SALMOND & SPRAGGON (AUSTRALIA) PTY. LIMITED

Plaintiff

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AND: JOINT CARGO SERVICES PTY. LIMITED and PORT JACKSON STEVEDORING PTY. LIMITED

Defendants

NOTICE DISPUTING FACTS

1. The second defendant disputes the following facts specified in the Plaintiff's Notice dated 10th October, 1974:

The facts alleged in paragraphs 1, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14 and 15.

20

2. The second Defendant admits the facts alleged in paragraphs 2, 3, 8, 16 and 17 of the Plaintiff's Notice dated 10th October, 1974.

DATED: 4th March, 1975

Sd: M. Thomson

Solicitor for the second defendant.

EXHIBITS

"G"

COPY LETTER KEARNEY BOYD & JOHNS TO DARE, REED, MARTIN & GRANT - 10th October 1974

JLC:9121:PD MET.JS 10th October, 1974

Messrs. Dare, Reed, Martin & Grant,
Solicitors,
187 Macquarie Street,
SYDNEY, N.S.W. 2000 10

Dear Sirs,

Re: Salmond & Spraggon (Australia) Pty. Limited v. Port Jackson Stevedoring Pty. Limited & Anor. Supreme Court Action No.5033 of 1971

We refer to your letter of 29th October last seeking consent to amendment of your client's pleas by addition of three further pleas numbered 4, 5 and 6.

We are now instructed to consent to the amendment of your client's pleas by addition of the three pleas numbered 4, 5 and 6 referred to, subject to further particulars and to such order as to costs as may be appropriate. 20

The further particulars requested as to each of the additional pleas are as hereunder:

1. Was the second defendant employed by the first defendant as an independent contractor expressly or impliedly or partly expressly and partly impliedly? 30

2. If expressly or partly expressly was it so employed orally or in writing or partly orally and partly in writing?

3. If orally or partly orally, when and where and by whom on behalf of the first defendant was it so employed, who arranged the employment on behalf of the second defendant and what were the terms of such employment?

4. If in writing or partly in writing please supply copies of such writing or alternatively state when and where they may be inspected on behalf of the plaintiff. 40

5. If impliedly or partly impliedly what are the facts and circumstances giving rise to such implication?

6. Particularize the nature of the services for the performance of which the second defendant was so employed.

In consenting to the amendment as above, we must also insist that the secondnamed Defendant also produce all additional documents relating to the additional pleas. We enclose herewith Notice to Produce all documents included in your client's List of Documents dated 21st November, 1973, together with additional documents which were referred to in the documents produced but not produced to the Plaintiff on discovery. It would be appreciated if you could let us have copies of these additional documents or an appointment be made to peruse the originals at the earliest possible date.

In addition, we enclose Notice to Admit Facts and seek your earliest reply as to the admissions your client is prepared to make.

We also give notice that the Plaintiff intends to seek leave to amend its Declaration by adding the following additional counts:

"3. And for a third count the plaintiff sues the defendants FOR THAT there were delivered to the defendants certain cartons of goods of the plaintiff to be safely kept and taken care of by the defendants for the plaintiff and to be delivered by the defendants to the plaintiff on demand for a reward to the defendants and the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid YET the defendants in breach of their duty as bailees as aforesaid failed upon demand by the plaintiff or at all to deliver the said goods to the plaintiff and the plaintiff being in doubt as to which of the defendants it is entitled to redress from sues the defendants jointly and severally and in the alternative to the intent that the question as to which, if any, of the defendants is liable and to what extent may it be determined as between all parties in accordance with the statute made and provided.

EXHIBITS

Plaintiff's Exhibits

"G"

Copy letter Kearney & Boyd & Johns to Dare, Reed, Martin & Grant

10th October 1974

(continued)

4. And for a fourth count the plaintiff sues the defendants FOR THAT there were delivered to the defendants certain cartons of goods of the plaintiff to be safely kept and taken care of by the defendants for the plaintiff and to be delivered by the defendants to the plaintiff on demand and the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid YET the defendants in breach of their duty as bailees as aforesaid failed upon demand by the plaintiff or at all to deliver the said goods to the plaintiff and the plaintiff being in doubt as to which of the defendants it is entitled to redress from sues the defendants jointly and severally and in the alternative to the intent that the question as to which, if any, of the defendants is liable and to what extent may it be determined as between all parties in accordance with the statute made and provided. 20

5. And for a fifth count the plaintiff sues the defendants for that there were delivered to the defendants certain cartons of goods of the plaintiff to be safely kept and taken care of by the defendants for the plaintiff and to be delivered by the defendants to the plaintiff on demand for a reward to the defendants and the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid yet the defendants in breach of their duty as bailees as aforesaid and without the authority of the plaintiff delivered the said goods to a person or persons other than the plaintiff and being a person or persons having no title or claim to possession of the said goods or any of them whereby the said goods were wholly lost to the plaintiff and the plaintiff being in doubt as to which of the defendants it is entitled to redress from sues the defendants jointly and severally and in the alternative to the intent that the question as to which, if any, of the defendants is liable and to what extent may be determined as between all parties in accordance with the statute made and provided. 30 40

6. And for a sixth count the plaintiff sues the defendants for that there were delivered to the defendants certain cartons of goods of the plaintiff to be safely kept and taken care of by the defendants for the plaintiff 50

and to be delivered by the defendants to the plaintiff on demand and the defendants received and had the said goods in their care and keeping for the purpose and upon the terms aforesaid yet the defendants in breach of their duty as bailees as aforesaid and without the authority of the plaintiff delivered the said goods to a person or persons other than the plaintiff and being a person or persons having no title or claim to possession of the said goods or any of them whereby the said goods were wholly lost to the plaintiff and the plaintiff being in doubt as to which of the defendants it is entitled to redress from sues the defendants jointly and severally and in the alternative to the intent that the question as to which, if any, of the defendants is liable and to what extent may be determined as between all parties in accordance with the statute made and provided."

Would you please notify us as early as possible as to whether you are prepared to consent to these amendments. In view of the amendment to your client's pleas and the proposed amendment to our client's Declaration, it may be possible to avoid the necessity for formal amendment to all the pleadings and simply by agreement file amended Issues. Your consent to this proposal would be appreciated.

We give the following particulars in relation to the proposed amendment to our client's Declaration :

1. The plaintiff furnishes the same particulars in respect of the new counts as it furnished in respect of the other two counts to the defendant.

2. The plaintiff demanded delivery of the said goods from the defendant orally on or about the 14th May, 1970.

3. The goods were delivered by the defendant to a person or persons whose identity is unknown to the plaintiff at approximately 12.50 p.m. on 14th May, 1970 at No.2 Wharf, Glebe Island. The identity of the person who made such delivery is not known to the plaintiff.

Yours faithfully,
KEARNEY BOYD & JOHNS
Per:

EXHIBITS

Plaintiff's Exhibits

"G"

Copy letter Kearney Boyd & Johns to Dare, Reed, Martin & Grant

10th October 1974

(continued)

EXHIBITS

Plaintiff's Exhibits

"G"

Copy letter Dare, Reed, Martin & Grant to Kearney Boyd & Johns and enclosure headed "Port Jackson Stevedoring Basic Terms and Conditions for Stevedoring in Sydney"

4th March 1975

EXHIBITS

"G"

COPY LETTER DARE, REED, MARTIN & GRANT TO KEARNEY BOYD & JOHNS AND ENCLOSURE HEADED "PORT JACKSON STEVEDORING BASIC TERMS AND CONDITIONS FOR STEVEDORING IN SYDNEY"
4th March 1975

DARE REED MARTIN & GRANT
Solicitors 10

Park House,
187 Macquarie Street,
Sydney, N.S.W. 2000

Your ref: MET:JS
Our ref: RGH:9121:SIM 4th March, 1975

Messrs. Kearney Boyd & Johns,
Solicitors,
86-88 Pitt Street,
SYDNEY, 2000

Dear Sirs, 20

Re: PORT JACKSON STEVEDORING PTY. LIMITED & ANOR ats SALMOND & SPRAGGON (AUST.) PTY. LIMITED

We refer to your letter dated 10th October, 1974. In the light of your intention to seek leave to amend the plaintiff's declaration by adding the counts referred to in the second and third pages of your letter, we have prepared Amended Pleas. A copy of the Amended Pleas is enclosed herewith. These Pleas incorporate all amendments proposed 30 by the second defendant. Would you kindly let us know whether you will consent to the filing of such Pleas.

The following further and better particulars are submitted of the Amended Pleas numbered 8, 9 and 10 (referred to as Pleas 4, 5 and 6 in your letter) :

1. Expressly

2. Partly orally, partly in writing

3. & 4. Prior to the arrival of the "New York Star" 40 in Sydney, an officer (whose name is not known) of the first defendant orally requested

an officer of the second defendant (whose name is not known) to supply sufficient dock labour, delivery clerks and watchmen to discharge and re-load the "New York Star" which was due to arrive at No.2 Wharf, Glebe Island on 9th May, 1970. The terms of the employment were to be in accordance with a document headed "Port Jackson Stevedoring Pty. Limited - Basic Terms and Conditions for Stevedoring at Sydney New South Wales". A copy of such document is enclosed.

5. Not applicable.

6. To stevedore the vessel "New York Star".

The only additional documents (relevant to the additional Pleas) which the second defendant has in the document, a copy of which is annexed hereto.

The documents referred to in the documents produced are privileged and it is not our intention to make copies available to you. The other documents referred to in Your Notice to Produce may be inspected at this office by arrangement with our Mr. Haines. However, we regret that we omitted to include in the List of Documents the following :

(1) Duplicate invoice No.028-70C

(2) Copy of debit note of Plaintiff addressed to First Defendant, dated 25/5/70.

We agree that formal amendment of all the pleadings is not necessary and that it will be sufficient to file amended issues.

Yours faithfully,
DARE, REED MARTIN & GRANT

Per: Sd:

(P.S.: We also enclose, by way of service, Notice Disputing Facts dated 4th March, 1975)

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20
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EXHIBITS

Plaintiff's Exhibits

"G"

Copy letter Dare, Reed, Martin & Grant to Kearney Boyd & Johns and enclosure headed "Port Jackson Stevedoring Basic Terms and Conditions for Stevedoring in Sydney"

4th March 1975

(continued)

PORT JACKSON STEVEDORING PTY.LTD.

BASIC TERMS AND CONDITIONS FOR STEVEDORING AT SYDNEY, N.S.W.

1. The stevedoring rate basis is per ton weight of 2240 lbs. or per measurement ton of 40 c.ft.

2. The rates per ton are based on current wages (1.10.1965) per hour ordinary time/ and current Port conditions, including customary gangs and sling loads. Any variation by competent authority will necessitate variation in the rates. 10

3. Rates include :

Pay Roll Tax
Australian Stevedoring Industry Charge
Association of Employers of Waterside Labour Levy
Silicosis Fund Levy
Annual Leave 20
Sick Leave & Statutory Holiday Levy

4. Workers Compensation Insurance

The rates do not include the cost of W.C.I. unless as specified by arrangement.

5. Extra Rates

Awarded by a competent authority in respect of work involving hazardous and/or obnoxious cargoes, or for any other reason shall be charged accordingly.

6. Overtime, Holiday and Meal-hour Rates of Pay 30

The difference respectively between ordinary rates, and overtime, holiday, or meal-hour rates of pay for all personnel shall be payable by the Ship at actual cost, plus 5% on nett wage content.

7. Meal Allowances

Meal allowances payable in accordance with Awards or Agreements covering all personnel, shall be paid for by the Ship, plus pay-roll tax thereon. 40

8. Additional Delays at bare cost

The following items are not included in the

Contract Rates :

(a) All weather delays

(b) All berthing delays

(c) Travelling Time

(d) All unused part of minimum engagement

(e) All delays on account of waiting for cargo including Rail Delays

(f) Awaiting Lighters

(g) Standing by time on account of discharging heavy lifts

(h) All delays on account of ships gear defects

(i) All delays on account of Elect.shore cranes, gantries, bulk cargo cranes

(j) All delays on account of Industrial Disputes

9. Extra Services

The cost of all extra work and services shall be charged at actual hourly cost plus 12½% disbursement fee, on nett wage content.

(a) Ships stores, baggage and mails

(b) Ammunition, explosives

(c) Hazardous cargo (where customary sling load is reduced accordingly)

(d) Cleaning holds, wharf

(e) Restowing cargo

(f) Covering and Uncovering Cargo

(g) Rigging and unrigging heavy lift derricks/gear.

30 10. Provision of Mechanical Equipment

The rates include the cost of all mechanical equipment including gantries and conveyors at current hire charges, except:

Floating Cranes/Heavy Lift Plant
Electrical Shore Cranes
Bulk Cargo Cranes
Mechanical Units used to :

1) Assist loading -

a) Refrigerated Cargo, or
b) Cargo direct from rail trucks

40

2) Receive cargo

EXHIBITS

Plaintiff's Exhibits

"G"

Copy letter Dare, Reed, Martin & Grant to Kearney Boyd & Johns and enclosure headed "Port Jackson Stevedoring Basic Terms and Conditions for Stevedoring in Sydney"

4th March 1975

(continued)

EXHIBITS

Plaintiff's Exhibits

"G"
Copy letter Dare, Reed Martin & Grant to Kearney Boyd & Johns and enclosure headed "Port Jackson Stevedoring Basic Terms and Conditions for Stevedoring in Sydney"

4th March 1975

(continued)

3) Break down cargo for delivery

11. Provision of Gear, Rope Wires, etc.

Where work is being performed at Contract Rates, the Stevedore shall be responsible for provision (including transport to and from the place of work on ship or shore) of customary gear for all stevedoring operations covered by the Schedule.

This does not include the following items, provision of which shall be chargeable as extras (on the basis of actual cost at current ruling rates) viz., rope slings, or shotters, drinking cups and buckets, shore cranes, grabs, trimming gear, tackles or derrick attachments for rigging of Ship's heavy lift gear, or gear for slinging of heavy lifts on hook, pallets, tarpaulings, industrial clothing, hatch tents, gangways, floating amenity barges, ladders, safety fencing, equipment for cleaning purposes, supplementary electric lighting, telephone connections to ship or dunnage for cargo stacked ashore.

Where work or services are carried out at other than Contract Rates, the Ship shall pay Hire Charges for all gear used, at the Rates set out in the annexed Schedule, plus the cost of transporting such gear to and from the place of work on Ship or Shore.

12. Transporting of Labour

The cost of transporting all labour, foremen, clerks or other personnel to or from the vessel, where incurred, shall be charged to the ship.

13. Working in Rain

To compensate the Stevedore for loss in efficiency when required to work in rain, a surcharge shall be payable by the Ship, applied on the basis of 12½% of the actual hourly cost of labour engaged in respect of all contract time worked by labour at a hatch (ship and shore) in periods when rain intervenes.

Rain Working Tents, if supplied, per day or part thereof - £15

Wet Weather Clothing services levy 1/- per suit issued.

14. Limitation of Stevedores Liability

When loss, damage or injury is occasioned to any cargo vessel or its crew by reason of negligence for which a contracting Stevedore is liable, the liability thereupon of the contracting Stevedore is limited to the sum of One Hundred Thousand Pounds (£100,000) in all in respect of any one incident and the Shipowner shall indemnify such Stevedore against all liability beyond the said sum, but notwithstanding the foregoing it is expressly agreed that the Stevedore shall be under no liability for any such loss, damage or injury arising from the failure or breakage of plant or gear not provided by him but provided by the Shipowner for his use in which case the Shipowner shall fully indemnify him against all liability.

15. The Port Jackson Stevedoring Pty.Limited reserves the right by mutual agreement with owners/agents to adjust the rates in exceptional cases, where the loading or discharging of a vessel is affected in a decisive manner by its arrangement the nature of the goods, their character and their placing or possibly special precautions are necessary with respect to personnel and machinery or lack of information as might delay the service of the ship and the measures of control.

16. Heavy Lifts

Charges for Heavy Lifts when handled by ships gear are as set out under Contract Rates for general cargo weight or measurement whichever is the greater. Cost of heavy lifts handled by Floating Cranes at current ruling hire charges.

17. Rates for Work in Lighters

The Contract Rates do not include the cost of labour provided for work in Lighters unless particularly specified accordingly.

18. Receiving Cargo

To be charged on the basis of actual cost plus 12½% disbursement fee on nett wage content, (mechanical equipment at cost).

19. Delivery of Cargo

To be charged on the basis of actual cost

EXHIBITS

Plaintiff's Exhibits

"G"

Copy letter Dare, Reed, Martin & Grant to Kearney Boyd & Johns and enclosure headed "Port Jackson Stevedoring Basic Terms and Conditions for Stevedoring in Sydney"

4th March 1975

(continued)

plus 12½% disbursement fee on nett wage content (mechanical equipment at cost)

20. Watching Services

The provisions and supervision of watchmen, including gate-keepers and patrol men to be charged on the basis of actual cost plus 10% disbursement fee on nett wage content.

PORT JACKSON STEVEDORING PTY.LIMITED

STEVEDORING RATES - UNITED KINGDOM TRADE

OPERATIVE FROM 5TH MAY, 1970

1

INCLUDING:

1) All Basic Labour Charges including Foreman
2) Tally Clerks employed Taking on Board and Stowing
3) All delays and extra work items normally encountered in Stevedoring operations
4) Cost of Mechanical Equipment and Drivers (except as where specified)
5) Extra Labour

2

EXCLUDING Workers Compensation Premiums

BY VESSELS OWN GEAR

		Discharging to Wharf	Discharging to Lighter
General Cargo	dwt	$6.14 per ton	$3.46 per ton
" "	mst	$4.09 per ton	$2.24 per ton
Motor Cars Parts C.K.Ds.	mst	$3.10 per ton	

3

LOADING: DELIVERING TO SHIPS SIDE AND TAKING ON BOARD AND STOWING

Millers Offal, Bran, Pollard & Copra Meal	ex Shed	$7.20 per ton dwt.
	ex Rail Trucks	$6.08 per ton dwt.
Bagged Wheat	ex Shed	$9.58 per ton dwt.
	ex Rail	$7.53 per ton dwt.

BAGGED CARGO

Grains, Flour.	ex Shed	$6.54 per ton dwt.
	ex Rail Trucks	$5.50 per ton dwt.
General Cargo	ex Shed	$7.08 per ton dwt.
	ex Shed	$5.30 per ton mst.
	ex Trucks	$5.93 per ton dwt.
	ex Trucks	$4.44 per ton mst.
Refrigerated Cargo	Cartons/ Mutton	$9.30 per ton dwt/mst
	Beef Sides	$11.81 per ton dwt.
	Butter/ Egg Pulp	$6.34 per ton dwt/mst
	Fresh Fruit	$4.59 per ton mst.
	Eggs,Sheel	$4.44 per ton mst.
Wool		$1.14 per bale
Sheepskins		$3.31 per bale
Motor Cars (M)	(New Zealand & Aust. Ports)	$2.40 per ton

EXHIBITS

Plaintiff's Exhibits

"G"

Copy letter Dare, Reed, Martin & Grant to Kearney Boyd & Johns and enclosure headed "Port Jackson Stevedoring Basic Terms and Conditions for Stevedoring in Sydney"

4th March 1975

(continued)

XHIBITS
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AUSTRALIA — DEPARTMENT OF CUSTOMS AND EXCISE

...RY FOR HOME CONSUMPTION

(In Quadruplicate)

Form 11 (11. 65) — Secs. 40A and 68, Reg. 37

For Official Use Only: DELIVERY O...

Received the amount printed by cash register.

State: NEW SOUTH WALES — Port: SYDNEY — Nature: 10 — Ship: "... YORK STAR" — From: ST. JOHN — Arrived — Station — Date

Owner: SALFORD & FERGUSON (AUST.) PTY. LIMITED. — Agent: L. F. FERRIS — Ref. No. — Entry No. 160

B/L No.	Marks and Numbers	No. of Pkgs.	Tariff Item	Stat. Code	Code	Quantity (describe units)	Origin Code	Value for Duty $	c	Customs Duty Rates	P.	$	c	Sales Tax Rate	$	c
	S & ... SYDNEY S-131/135 024-700-2 026-700-1 Nos.1-37	37	CARTONS 99.99.212		12		C.N.									
			RAZOR BLADES 82.11.500		46	259,202 No.	CAN									
			RAZORS 82.11.200		15	2,520 No.	CAN									
			CARDBOARD CARTONS 48.16.100		25	751 lb.	CAN									

TOTAL NUMBER OF PACKAGES: 37 — TOTALS: Value for Duty — Customs — Sales Tax

Stamp: AUSTRALIAN ... CUSTOMS — INVOICE SECTION — No. 10 — SYDNEY — MAY ... — [signature] — 1.5.70 — OFFICER — DATE

For Official Use Only.

Computer	State Clerk	Machinist	Manifest	Release

Room Check completed. Action required on.

Agent advised

I/We hereby certify that SALFORD & FERGUSON (A... is/are the holder/s of Sales Tax Certificate No. N.1569 — This quotation of certificate is in respect of all items shown on this entry (except ...)

Per ... *Partner, Proprietor, Public Officer.

I ... L. F. FERRIS ... the authorised agent of the owner, make this entry. ... Agent

* Strike out whichever is inapplicable. † Strike out the words in brackets if inapplicable.

SUNDRIES

TOTAL AMOUNT PAYABLE ON THIS ENTRY $

L. F. FERRIS & COMPANY 65 YORK STREET, SYDNEY

EXHIBITS

1.

DISCHARGING ACCOUNT STATEMENT ISSUED BY SECONDNAMED DEFENDANT 19th June 1970

108/114 Miller Street,Pyrmont 2009

Sydney 19th June 1970
Telephone: 660-3422

Captain/Owners/Agents

"M.V. NEW YORK STAR"

DISCHARGING ACCOUNT STATEMENT OF STEVEDORING ACCOUNTS

A/C Nos.1246-1260

In account with

PORT JACKSON STEVEDORING PTY.LIMITED

L.M.C.

CONTRACT		12077.49
EXTRA WORK	2241.38	
LOSS OF TIME	2909.89	
OVERTIME	5532.83	10684.10
OVERTIME TIMEKEEPERS & CLERKS	598.69	
CLERKS DELAYS	269.38	868.07
WORKERS COMPENSATION INSURANCE		50.59
WET WEATHER SURCHARGE		122.71
MECHANICAL EQUIPMENT	1879.03	
BREAKING DOWN CARGO	145.88	2024.91
GEAR	327.29	
WET WEATHER GEAR LEVY	15.00	
EXTRA MONEY	115.47	457.76
COVERING		95.68
CLERKS		2995.18
WATCHMEN - HOLD		280.39
WATCHMEN - SHED		1455.22
WATCHMEN - PATROL		748.64
WATCHMEN - SUPERVISING		1052.49
WHARF STOREMEN		336.84
		$33830.67

EXHIBITS

Firstnamed Defendant's Exhibits

1.

Discharging Account Statement issued by the Secondnamed Defendant

19th June 1970

EXHIBITS

Firstnamed Defendant's Exhibits

1\.

Discharging Account Statement issued by the Second-named Defendant

19th June 1970

(continued)

108/114 Miller Street, Pyrmont 2009
Sydney, 19th June 1970

Telephone 660-3422

Captain/Owners/Agents No.1246

"M.V. NEW YORK STAR"

In account with

PORT JACKSON STEVEDORING PTY. LIMITED

L.M.G.

DISCHARGING ACCOUNT

TO DISCHARGING 10

GENERAL (W) 607 TONS	4.91	2980.37	
" (M) 2038 TONS	3.27	6664.26	
" (M) 396 TONS	H/L	- -	
MOTOR CARS C.K.D. (M) 7 TONS	2.48	17.36	9661.99
3,048 TONS			

"FALCON" HEAVY LIFTS - SPECIAL ACCOUNT

1	SCOOP		=	9. 0.1. 2
3	GRADERS	ea 7.12.2.22	=	22.18.0.10
4	TRACTORS	ea 5. 8.3.18	=	21.15.2.16
2	CONTAINER		=	7. 2.2.14
2	CONTAINERS	ea 12.1.0.8	=	24. 2.0.16
3	SCOOPS	ea 9. 0.0.22	=	27. 0.2.10
2	GRADERS	ea 7.12.2.22	=	15. 5.1.16
4	SCOOPS	ea 5.13.3.12	=	22.15.1.20
				150. 0.0.20

20 20

	- -
	9661.99
SURCHARGE 25% ON $9661.99	2415.50
	$12077.49

EXHIBITS

Firstnamed Defendant's Exhibits

1.

Discharging Account Statement issued by the Secondnamed Defendant

19th June 1970

(continued)

108/114 Miller Street,Pyrmont 2009
Sydney 19th June 1970
Telephone: 660-3422

Captain/Owners/Agents

"M.V. NEW YORK STAR" No.1247

In account with

PORT JACKSON STEVEDORING PTY. LIMITED
L.M.G.

TO EXTRA WORK (DISCHARGING)					
	FOREMEN	451/12 HOURS	@3.54	159.59	
10	MEN	696¼ "	@2.99	2081.79	2241.38
TO LOSS OF TIME					
	RAIN	14.55	223.10		
	MINIMUM TIME	6.20	91.10		
		41.25	662.25		
		62.40	976.45		
	FOREMEN	62⅔ HOURS	@3.26	204.29	
	MEN	976¾ "	@2.77	2705.60	2909.89
TO OVERTIME					
20 3pm-11pm	FOREMEN	128 HOURS	@1.08	138.24	
	MEN	1426½ "	@0.85	1212.53	
	FOREMEN	120 "	@2.16	259.20	
(illegible)	MEN	1192½ "	@1.71	2039.18	
	FOREMEN	56 "	@4.31	241.36	
	MEN	609 "	@2.56	1559.04	
					5449.55
MEAL ALLOWANCES					
	FOREMEN	5	@1.50	7.50	
	MEN	59	@1.25	73.75	
				81.25	
	PAY ROLL TAX 2½%			2.03	83.28
30					$10684.10

EXHIBITS

Firstnamed Defendant's Exhibits

1.

Discharging Account Statement issued by the Secondnamed Defendant

19th June 1970

(continued)

108/114 Miller Street, Pyrmont 2009
Sydney 19th June 1970
Telephone: 660-3422

Captain/Owners/Agents

"M.V. NEW YORK STAR" No.1248

In account with

PORT JACKSON STEVEDORING PTY. LIMITED

L.M.G.

TO TIMEKEEPERS AND STACKING CLERKS OVERTIME (DISCHARGING) 10

TIMEKEEPERS	40 HOURS	@1.19	47.60	
	52 "	@2.37	123.24	
	24 "	@3.56	85.44	256.28
STACKING CLERKS				
	88 HOURS	@1.05	92.40	
	68 "	@2.10	142.80	
	32 "	@3.15	100.80	336.00
MEAL ALLOWANCES	5	@1.25	6.25	
PAY ROLL TAX 2½%			16	6.41
				598.69
STACKING CLERKS DELAYS	107¾ HOURS	@2.50		269.38
				$868.07

20

108/114 Miller Street Pyrmont 2009
Sydney 19th June 1970
Telephone: 660-3422

EXHIBITS

Firstnamed Defendant's Exhibits

1.

Discharging Account Statement issued by the Secondnamed Defendant

19th June 1970

(continued)

Captain/Owners/Agents

"M.V. NEW YORK STAR" No.1249

In account with

PORT JACKSON STEVEDORING PTY. LIMITED
L.M.G.

TO WORKERS COMPENSATION INSURANCE ON OVERTIME

10 CONTENT OF SUPERVISORS & TIMEKEEPERS WAGES (DISCHARGING)

SUPERVISORS	40 HOURS	@1.23	49.20	
	52 "	@2.46	127.92	
	24 "	@4.92	118.08	295.20
TIMEKEEPERS	40 HOURS	@1.10	44.00	
	52 "	@2.21	114.92	
	24 "	@3.31	79.44	238.36
				$533.56

WORKERS COMPENSATION INSURANCE	7.25% ON $295.20	21.40
" " "	1.00% ON $238.36	2.38
		23.78
COMMON LAW RISK 22½%		5.35
		29.13
" " " EXT 5%		1.46
		$30.59

20

POSTED

EXHIBITS

Firstnamed Defendant's Exhibits

1.

Discharging Account Statement issued by the Secondnamed Defendant

19th June 1970

(continued)

108/114 Miller Street, Pyrmont 2009
Sydney 19th June 1970

Captain/Owners/Agents

"M.V. NEW YORK STAR" No.1250

In account with

PORT JACKSON STEVEDORING PTY. LIMITED

L.M.G.

TO SURCHARGE IN RESPECT OF CONTRACT TIME WORKED DURING RAIN (DISCHARGING)

FOREMEN	20¾	HOURS	@3.26	67.65	
MEN	311¼	"	@2.77	862.16	
CLERKS	20¾	"	@2.50	51.88	981.69
				981.69	
SURCHARGE 12½% ON $98.69					$122.71

10

EXHIBITS

Firstnamed Defendant's Exhibits

1.

Discharging Account Statement issued by the Secondnamed Defendant

19th June 1970

(continued)

108/114 Miller Street, Pyrmont 2099
Sydney 19th June 1970

Telephone: 660-3422

Captain/Owners/Agents

"M.V. NEW YORK STAR" No.1251

In account with

PORT JACKSON STEVEDORING PTY. LIMITED

L.M.G.

TO HIRE OF MECHANICAL EQUIPMENT (DISCHARGING)

10

OVERTIME	184 HOURS	@0.92	169.28	
	140 "	@1.84	257.60	
	64 "	@2.76	176.64	603.52
MEAL ALLOWANCES	6	@1.25	7.50	
PAY ROLL TAX 2½%			19	7.69
				611.21

MECHANICAL DELAYS

CRANES	215¼ HOURS	@3.00	645.75	
DRIVERS	215¼ "	@2.89	622.07	1267.82
				1879.03

20

TO HIRE OF MECHANICAL EQUIPMENT
BREAKING DOWN CARGO

18 1 Driver 7.30am-3.30pm = 8 Hours
19 1 " " " = 8 "
20 1 " " " = 8 "

24 HOURS
@ 3.12 74.88

TO HIRE OF OUTSIDE MECHANICAL EQUIPMENT
P.J.M.S. A/C 71.00 145.88

30

$2024.91

EXHIBITS

Firstnamed Defendant's Exhibits

1.

Discharging Account Statement issued by the Secondnamed Defendant

19th June 1970

(continued)

108/114 Miller Street, Pyrmont 2009
Sydney 19th June 1970
Telephone: 660-3422

Captain/Owners/Agents

"M.V. NEW YORK STAR" No.1252

In account with

PORT JACKSON STEVEDORING PTY. LIMITED

L.M.G.

TO HIRE OF GEAR (DISCHARGING)

WATER BUCKETS	48		@0.25	12.00	
DRINKINGS CUPS	566	per doz	0.15	7.07	
ROPE SLINGS	384		@0.75	288.00	
GLOVES PAIRS	24		@0.53	12.72	
2½" WIRES	4		@0.60	2.40	
4" "	4		@1.20	4.80	
20 TON SHACKLE	1		@0.30	30	
					327.29

10

TO LEVY ON WET WEATHER GEAR ISSUED BY A.E.W.L. POOL

150 SUITS	@0.10		15.00

20

TO EXTRA PAY TO LABOUR A/C OBNOXIOUS CONDITIONS (DISCHARGING)

	699 HOURS	@0.05	34.95	
	329 "	@0.10	32.90	
	194 "	@0.20	38.80	
AMENITIES	8	@0.75	6.00	
			112.65	
PAY ROLL TAX 2½%			2.82	115.47
				$457.76

POSTED

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108/114 Miller Street,Pyrmont 2009
Sydney 19th June 1970

Telephone: 660-3422

Captain/Owners/Agents

"M.V. NEW YORK STAR" No.1253

In account with

PORT JACKSON STEVEDORING PTY. LIMITED
L.M.G.

TO LABOUR SUPPLIES INWARD CARGO (DISCHARGING)

32 HOURS @2.99

$95.68

EXHIBITS

Firstnamed Defendant's Exhibits

1.
Discharging Account Statement issued by the Secondnamed Defendant

19th June 1970

(continued)

EXHIBITS

Firstnamed Defendant's Exhibits

1.

Discharging Account Statement issued by the Secondnamed Defendant

19th June 1970

(continued)

108/114 Miller Street, Pyrmont 2009
Sydney 19th June 1970
Telephone: 660-3422

Captain/Owners/Agents

"M.V. NEW YORK STAR"

In account with
PORT JACKSON STEVEDORING PTY.LIMITED

L.M.G.

TO SERVICES OF TALLY CLERKS DELIVERING INWARD CARGO (DISCHARGING)

10

		1	1½	2	2½	M/M
WEEK ENDING	10.5.70	32	-	4	16	1
"	17.5.70	40	15	4	8	6
"	24.5.70	32	-	7	-	-
"	31.5.70	40	-	-	-	-
"	7.6.70	20	-	-	-	-
		164	15	15	24	

WEEK ENDING	10.5.70	8	-	-	8	1
"	17.5.70	216	35	4	13	6
"	24.5.70	216	-	21	-	-
"	31.5.70	176	-	-	-	-
"	7.6.70	8	-	-	-	-
		624	35	25	21	14

20

164	HOURS	@3.10	508.40	
15	"	@4.29	64.35	
15	"	@5.47	82.05	
24	"	@6.66	159.84	
624	"	@2.79	1740.96	
35	"	@3.84	134.40	
25	"	@4.89	122.25	
21	"	@5.94	124.74	2936.99
MEAL ALLOWANCES	14	@1.25	17.50	
PAY ROLL TAX 2½%			44	17.94
				2954.93

30

STATIONERY SUPPLIED

	MANIFEST BOOK		3.40	
7	TALLY BOOKS	@2.30	16.10	
8	GATE PASS BOOKS	@1.60	12.80	
9	STACKING BOOKS	@0.55	4.95	
	CARBON ETC.		3.00	40.25
				$2995.18

40

108/114 Miller Street, Pyrmont 2009
Sydney 19th June 1970
Telephone: 660-3422

EXHIBITS

Firstnamed Defendant's Exhibits

1.

Discharging Account Statement issued by the Secondnamed Defendant

19th June 1970

(continued)

Captain/Owners/Agents

"M.V. NEW YORK STAR" No.1256

In account with

PORT JACKSON STEVEDORING PTY. LIMITED
L.M.G.

TO SERVICES OF HOLD WATCHMEN (DISCHARGING)

WEEK ENDING		1	1½	2	2½	H/P	M/M
				8	16	24	2
	10.5.70	-	-				
"	17.5.70	123½	116½	56	8	304	1
SHORT PAID (17.5.70)	24.5.70	- -	-	-	8	8	1
		123½	116½	64	32	336	4

123½ HOURS		@1.80	222.30	
116½ "		@2.50	291.25	
64 "		@3.20	204.80	
32 "		@3.90	124.80	843.15
HOLIDAY PAY				
336 "		@0.08		26.88
MEAL ALLOWANCES	4	@1.25	5.00	
PAY ROLL TAX 2½%			13	5.13
				875.16

EXTRA PAY A/C OBNOXIOUS CONDITIONS

24 HOURS	@0.05	1.20	
35 "	@0.10	3.50	
2 "	@0.20	40	
		5.10	
PAY ROLL TAX 2½%		13	5.23
			$ 880.39

POSTED

EXHIBITS

Firstnamed Defendant's Exhibits

1.

Discharging Account Statement issued by the Secondnamed Defendant

19th June 1970

(continued)

108/114 Miller Street, Pyrmont
2009

Sydney 19th June 1970
Telephone: 660-3422

Captain/Owners/Agents

"M.V. NEW YORK STAR" No.1257

In account with

PORT JACKSON STEVEDORING PTY. LIMITED

L.M.G.

TO SERVICES OF SHED WATCHMEN (DISCHARGING) 10

WEEK ENDING		1	1½	2	2½	H/P	M/M
	10.5.70	-	-	8	16	24	2
"	17.5.70	117	118	56	24	315	3
"	24.5.70	104	71½	4	16	195½	2
"	31.5.70	39	9	-	-	48	-
		260	198½	68	56	582½	7

	260	HOURS	@1.80	468.00	
	198½	"	@2.50	496.25	
	68	"	@3.20	217.60	
	56	"	@3.90	218.40	1400.25
HOLIDAY PAY	582½	"	@0.08		46.60
MEAL ALLOWANCES		7	@1.25	8.75	
PAY ROLL TAX 2½%				22	8.97
					$1455.82

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108/114 Miller Street, Pyrmont 2009
Sydney 19th June 1970
Telephone: 660-3422

EXHIBITS

Firstnamed Defendant's Exhibits

1.

Discharging Account Statement issued by the Second-named Defendant

19th June 1970

(continued)

Captain/Owners/Agents

"M.V. NEW YORK STAR" No.1258

In account with

PORT JACKSON STEVEDORING PTY. LIMITED

L.M.G.

TO SERVICES OF PATROL WATCHMEN (DISCHARGING)

10

WEEK ENDING	$1\frac{1}{2}$ / -	2 / 8	$2\frac{1}{2}$ / 8	H/P / 16	M/M / 1
? 5.70	40	52	16	108	1
? 5.70	40	56	16	112	-
? 5.70					
	80	116	40	236	2

80 HOURS		@2.50	200.00	
116 "		@3.20	371.20	
40 "		@3.90	156.00	727.20
HOLIDAY PAY 236 "		@0.08		18.88
MEAL ALLOWANCES	2	@1.25	2.50	
PAY ROLL TAX $2\frac{1}{2}$%			06	2.56
				$748.64

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EXHIBITS

Firstnamed Defendant's Exhibits

1\.

Discharging Account Statement issued by the Second-named Defendant

19th June 1970

(continued)

108/114 Miller Street, Pyrmont 2009

Sydney 19th June 1970

Telephone: 660-3422

Captain/Owners/Agents

"M.V. NEW YORK STAR" No.1259

In account with

PORT JACKSON STEVEDORING PTY. LIMITED

L.M.G.

TO SERVICES OF SUPERVISING WATCHMEN (DISCHARGING) 10

WEEK ENDING	1	1½	2	2½	3	H/P	M/M
	-	-	8	16½	½	25	1
? 5.70	32½	50	44½	11	1	139	2
? 5.70	32½	56	27½	16½	-	132½	4
? 5.70	32½	13½	-	-	-	46	1
? 5.70							
	97½	119½	80	44	1½	342½	8

	97½ HOURS		@1.99	194.03	
	119½ "		@2.78	332.21	
	80 "		@3.57	285.60	
	44 "		@4.36	191.84	
	1½ "		@5.15	7.73	1011.41
HOLIDAY PAY	342½ "		@0.09		30.83
MEAL ALLOWANCES		8	@1.25	10.00	
PAY ROLL TAX 2½%				25	10.25
					$1052.49

20

108/114 Miller Street, Pyrmont 2009
Sydney 19th June 1970

Telephone: 660-3422

EXHIBITS

Firstnamed Defendant's Exhibits

1.

Discharging Account Statement issued by the Secondnamed Defendant

19th June 1970 (continued)

Captain/Owners/Agents

"M.V. NEW YORK STAR" No.1260

In account with

PORT JACKSON STEVEDORING PTY.LIMITED

L.M.G.

TO SERVICES OF WHARF STOREMEN (DISCHARGING)

WEEK ENDING	1	1½	2	3	M/M
	40	2	4	8	2
? 5.70	40	---	--	-	-
? 5.70	40	-	-	-	-
? 5.70					
	120	2	4	8	2

	120 HOURS	@2.03	243.60		
	2 "	@3.00	6.00		
	4 "	@3.97	15.88		
	8 "	@5.90	47.20	312.68	
HOLIDAY PAY	120 "	@0.18		21.60	
MEAL ALLOWANCES	2	@1.25	2.50		
PAY ROLL TAX 2½%			06	2.56	
			$	336.84	

EXHIBITS

Firstnamed Defendant's Exhibits

2.

Schedule "H" The Maritime Services Board of NSW - berthing charges

Schedule "H"

THE MARITIME SERVICES BOARD OF N.S.W.

PARTICULARS OF VESSEL AND BERTHING IN RESPECT OF VESSELS LIABLE TO PAYMENT OF TONNAGE RATES.

Name of Vessels	Name of Owner or Agent	Gross Registered Tonnage of Vessels. Tons.	Wharf	Arrival at Wharf: Month	Day	Hour	Min.	a.m. or p.m.	Departure from Wharf: Month	Day	Hour	Min.	a.m. or p.m.	Time Berthed: Day	Hour	Min.
[illegible] STAR	[illegible] CARGO [illegible] PTY. LTD.	7372	1. 2 Glebe Is.	5	9	14	[illegible]	pm	[illegible]	17	17	35	pm	7	22	45
			2.													
			3.													
			4.													
			5.													
			6.													
			Total Time Berthed (to be filled in only when this return is made in respect of one vessel).											7	22	45

Stamp: Particulars for Payment — Code: 153x16D — Amount

	$	c.
Rates at* [illegible] per ton per period of six hours or part thereof on 7372 tons for 32 periods	943	62
Rates at* per ton per period of six hours or part thereof on .... tons for .... periods		
Rates at* per ton per period of six hours or part thereof on .... tons for .... periods		
Rates at* per ton per period of six hours or part thereof on .... tons for .... periods		
TOTAL $	943	62

Amount payable to be written in words: Nine Hundred forty-three Dollars; sixty-two Cents

I [illegible] the above particulars to be correct and undertake, should the vessel or vessels above referred to berth at any wharf or wharves [illegible] to lodge supplementary particulars, and to pay the additional tonnage rates in respect thereof, should any accrue.

[signature] (Signature of Master, Owner or Agent)

APPLICATION FOR BERTH

NAME OF AGENT	NAME OF VESSEL	DATE OF ARR
[illegible]	[illegible] STAR	9 5

CARGO TO BE DISCHARGED	CARGO TO BE LOADED
2981 MANIFEST TONS	— MANIFEST T

NAME OF OPERATIONS SUPERVISOR (BLOCK LETTERS)	SIGNATURE OF OPERATIONS SUPERVISOR
Capt. W. Harr	[signature]

REGISTRATION NUMBERS OF VEHICLES (2 ONLY) NOMINATED FOR PARKING	ATF 307 CPO 594	I HEREBY WARRANT THAT I AM AUTHORISED BY THE AGENT ABOVENAMED TO MAKE THIS APPLICATION McDonald DATE 8. 5. 70

OFFICE USE ONLY

BERTH ALLOCATED [illegible] DATE 7 - 5 - 7

VESSEL ARRIVED 9 - 5 - 1970 (DATE) VESSEL DEPARTED 17 MAY [illegible] (DATE)

ASSISTANT HARBOUR MASTER (C&W)

- 8 MAY 1970

SH49

EXHIBITS

Firstnamed Defendant's Exhibits

3.

Copy document headed "Application for berth" refused by Maritime Services Board

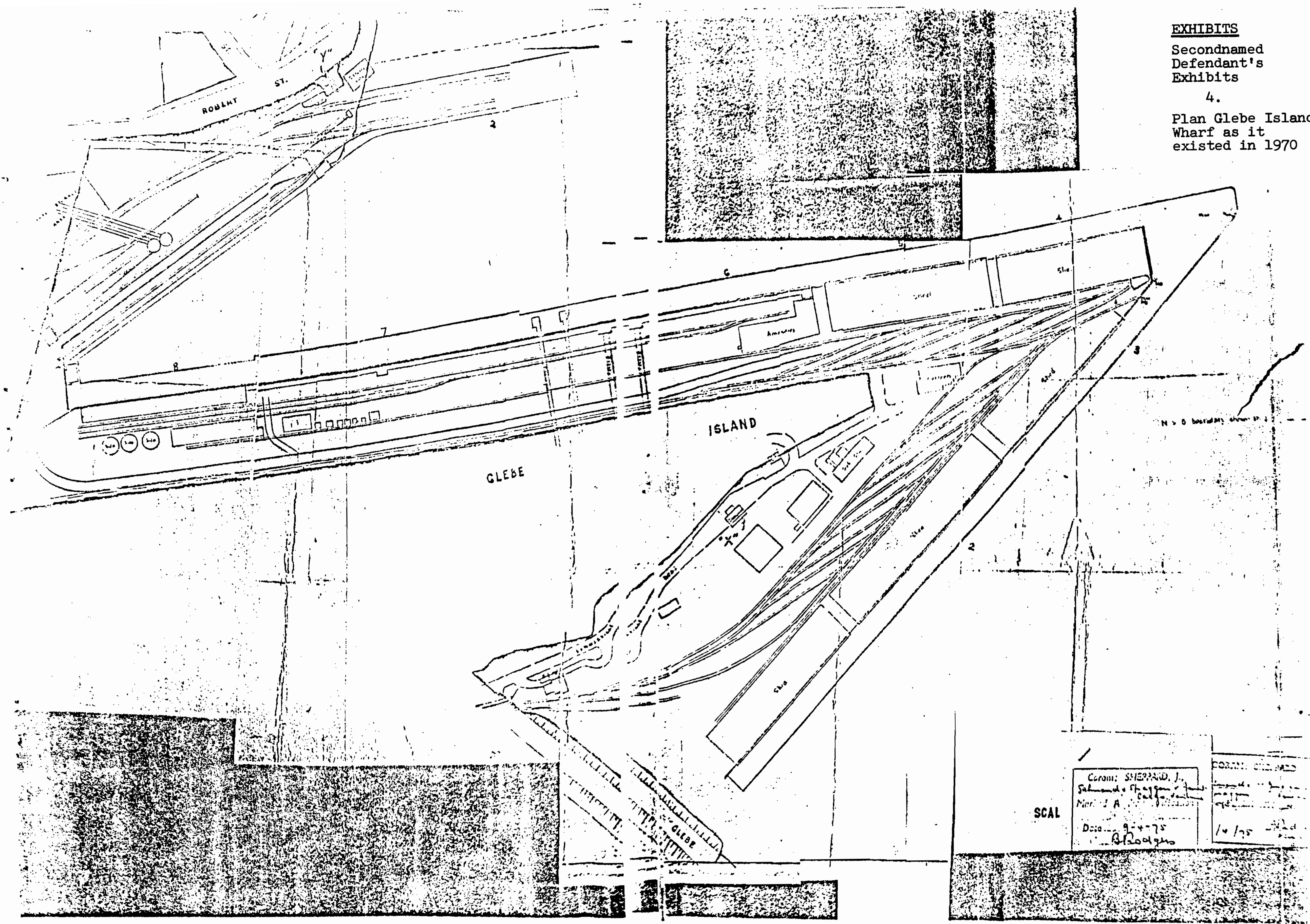
7th May 1970

EXHIBITS

Secondnamed Defendant's Exhibits

4.

Plan Glebe Island Wharf as it existed in 1970



EXHIBITS

Secondnamed Defendant's Exhibits

5.
Handwritten Statement and typed copy of the deceased employee of Overseas Shipping

14th May 1970

[illegible]

Balmain Gate
14 . 5 . 70

Sir.

On Thursday 14.5.70 at 1.0 pm
In company with Delivery Clerk Mr Rouse of [illegible] Shed. We were standing at the entrance of the Inward Gate when a white Ford Sedan came to the Gate-way from the Plete area. This vehicle stopped in the inward Gate Blocking same. At the same time motor vehicle loaded with cartons & travelling very fast came to the Gate on the outward side & also from the Plete area. I made towards the outward Gate to stop it but this vehicle was travelling too fast it was not going to stop for me or anything else. This vehicle had two other passengers seated beside of Driver.

The Number of this vehicle as shown on rear of vehicle was BSJ 856.

This vehicle then turned left after passing through Gate.

The centre of this loading was covered with [illegible] tarps & tied down, could not see what was under same.

Reported same to Balmain Police at 1-10 pm, Pillage Police at approx 1-31 pm, [illegible] at 1-5 pm.

[signature illegible]

5.

HANDWRITTEN STATEMENT AND TYPED COPY OF THE DECEASED EMPLOYEE OF OVERSEAS SHIPPING 14th May 1970

of Glebe Island, dated 14.5.70

On Thursday 14.5.70 at 1 p.m., in company with Delivery Clerk Mr. Rouse of Patrick Stevedoring Co., I was standing at the Entrance of the Inward Gate when a white Ford Sedan came to the Gateway from the Glebe Area. This vehicle stopped in the Inward Gate, blocking same. At the same time a motor vehicle loaded with cartons and travelling very fast came to the Gate on the Outward side, also from the Glebe area. I made towards the Outward gate to slam it shut
20 but this vehicle was travelling too fast and was not going to stop for me or anything else. This vehicle had two other passengers seated beside the Driver.

The number of this vehicle as shown on the rear was BJY-836.

This vehicle turned left after passing through the Gate.

The centre of this loading was covered with a tarp and tied down, I could not see
30 what was under same.

Reported same to the Balmain Police at 1.10 p.m. and to the Pillage Police at approx. 1.30 p.m.

Glebe Island 1.50 p.m.

(Signed) R. Wileman

EXHIBITS

Secondnamed Defendant's Exhibits

6.

Storing and Stacking reconciliation issued by the Firstnamed Defendant

24th June 1970

EXHIBITS

6.

STORING AND STACKING RECONCILIATION ISSUED BY THE FIRST-NAMED DEFENDANT - 24th June 1970

SORTING & STACKING RECONCILIATION

m.v. NEW YORK STAR Voy. 16

Arrived 9.5.70 Sailed 17.5.70 Amended 24 JUNE 1970

10

SUMMARY OF MANIFEST

GENERAL	WT	526-14-1-18	@ 4.02	= $2117.42
TRANS TANKS	WT	10- 2-3-12	@ 1.32	= $ 13.39
STEEL	WT	42- 5-3-15	@ 3.43	= $ 145.07
REFRIGERATED	WT	27-13-2- 8	@ 5.44	= $ 150.57
GENERAL	MST	86521' 0"	@ 2.57	= $5558.97
DRUMS	MST	5489' 0"	@ 2.06	= $ 282.68
REFRIGERATED	MST	1512' 0"	@ 3.30	= $ 124.74
AUTO PARTS	MST	270' 0"	@ 1.85	= $ 12.49
CONTAINERS	MST	3840' 0"	@ 2.57	= $ 172.70

Less 30%

20

LESS Overcarried Cargo NIL

Plus Returned Cargo NIL

TOTALS: WT.606-16-2-25 MST. 97632' 0" $8578.03

LESS ADJUSTMENTS

Heavy Lifts refunded 15848' 3" $ 944.23
Sorting & Stacking collected for credit of vessel NIL
Frozen Fish (Blue Star & Port Line vessels only) NIL

30

Bulk Liquid	NIL
Tetra Ethyl Lead	NIL
Octel	NIL
Anti-Knock Compound	NIL
Explosives	NIL
Empty Containers	NIL
Bullion	NIL
Bulk Tallow	NIL
Timber	NIL

NET Total sorting and stacking

WT.606-16-2-25 MST.81783' 9" $7633.80

40

DEBIT NOTES

Government Departments $7.01
Master & Owners ships stores NIL
Master & Owners T/S etc. $17.56

Amounts not collected as at 27.5.70 $634.85
Total collections credited as per card at
List of all Heavy Lifts (City vessels only)

EXHIBITS

Secondnamed Defendant's Exhibits

6.

Storing and Stacking reconciliaation issued by the Firstnamed Defendant

24th June 1970

(continued)

HEAVY LIFT LIST

B/L	256	4 Protection packed Model JD 760 tractors 2156' 0" @ 2.57 per 40 cu.ft.	= $138.52
B/L	259	4 Protection packed Model JD 760A scrapers 4 model JD 544 Loaders 4276' 0" @ 2.57 per 40 cu.ft.	= $274.73
B/L	257	5 Protection packed Model JD 570 motor graders 5576' 3" @ 2.57 per 40 cu.ft.	= $358.27
B/L	321	1 container 1 NTU 263188 (472 ctns) cardboard games 1280' 0" @ 2.57 per 40 cu.ft. Less 30%	= $ 57.57
B/L	367	2 Containers, 261705 and 271536, containing 165 ctns internal combustion engines 2560' 0" @ 2.57 per 40 cu.ft. Less 30%	= $115.14

Heavy Lift Totals

15848' 3" $944.23

Third page
of Exhibit 6

P J S

[illegible] Adjustments

[illegible] (June '70 [illegible]).

	Gross	10%	Net	[illegible]	[illegible]
[illegible]	11910.05	1191.01	10719.08	433.09	10,256.[illegible]
[illegible]	11769.87	1176.98	10592.85	427.69	10164.96
Overstated A/cs	140.26	14.03	126.43	5.10	121.13

[illegible] ← X

[illegible]	7633 82	763 38	6870 44	277 52	6592 92
[illegible])	7105.31	710.53	6394.78	258.31	6136 41
Overstated A/cs	528 45	52.85	475.64	19.21	456 43

Total Overstated	$ 668.75	66.88	601.87	24.31	577 56

Dr [illegible] 577 56
[illegible] 24 31

Cr [illegible] $ 601 87

(J276)

EXHIBITS

Secondnamed Defendant's Exhibits

6.

Storing and Stacking Reconciliation issued by the Firstnamed Defendant

24th June 1970

(continued)

CREDIT NOTE

G.P.O. BOX 539
56 PITT STREET
SYDNEY, 2001

26/6/70

Port Jackson Stevedoring Co. P/L
108-114 Miller Street,
PYRMONT, N.S.W. 2009

Credit by: JOINT CARGO SERVICES PTY.LIMITED
(Incorporated in A.C.T.)

10 BY SETTLEMENT OF SORTING & STACKING - SYDNEY

"New York Star" Sailed 17.5.70	Voyage 16D	7105.31	
	Less 10% Commission	710.53	
		6394.78	
	Less .1% Stamp Duty	7.10	
			$6387.68

IN THE PRIVY COUNCIL No. 5 of 1979

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

PORT JACKSON STEVEDORING PTY. LIMITED Appellant (Second Named Defendant)

- and -

SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED Respondent (Plaintiff)

RECORD OF PROCEEDINGS

RICHARDS BUTLER AND CO.
5 Clifton Street,
London, EC2A 4DQ

Solicitors for the Appellant

CLYDE AND CO.
Colonial House,
30 Mincing Lane,
London, EC3

Solicitors for the Respondent